TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 746

ROBERT A. TAFT, EXECUTOR OF THE ESTATE OF ANNA S. TAFT, DECEASED, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 1, 1938.

CERTIORARI GRANTED MARCH 7, 1938.

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 16, 1938.

—4588

[fol. 1]

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 77923

ROBERT A. TAFT, Executor of the Estate of Anna S. Taft, Deceased, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

APPEARANCES:

For Taxpayer: Chas. A. Taft, Esq., John H. More, Esq., Robt. A. Taft, Esq.

For Commissioner: E. C. Algire, Esq., Floyd B. Harrison, Esq.

DOCKET ENTRIES

1934.

Nov. 23. Petition received and filed. Taxpayer notified. (Fee paid.)

Nov. 23. Copy of Petition served on General Counsel.

1935

Jan. 4. Answer filed by General Counsel.

Jan. 10. Copy of answer served on taxpayer.

Jan. 22. Motion to set for hearing between Feb. 22 and Mar. 1, 1935, filed by taxpayer. 1/24/35 Granted.

Jan. 29. Hearing set Feb. 25, 1935.

Feb. 25. Hearing had before Mr. Sternhagen on merits. Submitted. Time for oral argument to be set later. Amended petition filed and copy served. Answer to amended petition to be filed later. Stipulation of facts filed. Petitioner's brief due 3-27-35. Respondent's brief due 4-26-35. Petitioner's reply 5-13-35.

[fol. 2]

Mar. 6. Transcript of hearing of Feb. 25, 1935, filed.

Mar. 12. Answer to amended petition filed by General Counsel.

Mar. 15. Copy of answer to amended petition served.

Mar. 27. Brief filed by taxpayer. 3/27/35 copy served.

Apr. 26. Brief filed by General Counsel.

DOCKET ENTRIES—Continued

1935.

May 13. Reply brief filed by taxpayer. 5/13/35 copy served.

Dec. 10. Findings of fact and opinion rendered, Mr. J. M. Sternhagen, Div. 10. Judgment will be entered under Rule 50.

1936.

Jan. 18. Notice of final settlement filed by General Counsel.

Jan. 23. Hearing set 2-12-36 under Rule 50.

Feb. 6. Consent to settlement filed by taxpayer.

Feb. 11. Judgment entered, Mr. J. M. Sternhagen, Div. No. 10.

Apr. 30. Petition for review by United States Circuit Court of Appeals, Sixth Circuit, with assignments of error filed by General Counsel.

May 6. Proof of service filed by General Counsel.

May 8. Petition for review by United States Circuit Court of Appeals, Sixth Circuit, with assignments of error filed by taxpayer.

May 8. Proof of service filed by taxpayer.

June 15. Motion for extension to Aug. 29, 1936 to prepare and transmit record filed by General Counsel.

June 15. Order enlarging time for preparation of evidence and transmission and delivery of record sur petition for review to Aug. 29, 1936, entered. (Commissioner.)

June 29. Motion for extension of 60 days to prepare statement and transmit record filed by taxpayer.

July 1. Certified copy of order from 6th Circuit for transmission of certain original exhibits filed.

July 2. Motion for extension of 60 days to prepare statement and transmit record filed by taxpayer.

July 2. Order that time for preparation of evidence and delivery of record be extended to Sept. 8, 1936, entered. (Taxpayer.)

[fol. 3]

Aug. 21. Motion for extension of 30 days to prepare and transmit record filed by General Counsel.

Aug. 21. Order enlarging time to Sept. 29, 1936 to prepare and deliver record, entered. (Commissioner.)

Sept. 2. Motion for extension of 30 days to prepare and transmit record filed by taxpayer.

DOCKET ENTRIES—Continued

1936.

Sept. 2. Order enlarging time to Oct. 8th to prepare and deliver record entered. (Taxpayer.)

Sept. 25. Agreed statement of evidence lodged. (Commissioner's Appeal.)

Sept. 25. Praecipe filed by General Counsel with proof of service thereon.

Sept. 28. Agreed statement of evidence approved and ordered filed. (Commissioner's Appeal.)

Sept. 29. Order that time for transmission and delivery of record be extended to Oct. 31, 1936, entered. (Commissioner's Appeal.)

Oct. 5. Agreed statement of evidence lodged. (Taxpayer's Appeal.)

Oct. 5. Praecipe filed by taxpayer—proof of service thereon.

Oct. 5. Agreed statement of evidence approved and ordered filed. (Taxpayer's Appeal.)

Oct. 12. Order that time for transmission and delivery of record be extended to Oct. 31, 1936, entered. (Taxpayer's Appeal.)

[fol. 4] BEFORE UNITED STATES BOARD OF TAX APPEALS

AMENDED PETITION—Filed February 25, 1935

Now comes the above named petitioner and says that he filed his petition for a redetermination of the estate tax deficiency for the estate of Anna S. Taft, deceased, set forth by the respondent in his notice of deficiency (MT-ET-C1-2337-1st Ohio) dated September 22, 1934, on November 23, 1934, and hereby files his amended petition for a redetermination of said estate tax deficiency for the purpose of correcting certain statements of facts contained in said petition, and for the purpose of alleging the facts upon which the petitioner relies with reference to Items 72, 73, 74 and 75, which facts were omitted from said petition by mistake.

As a basis for this proceeding the above named petitioner hereby alleges as follows:

1. The petitioner is a citizen of the United States, a resident of the State of Ohio, with offices at 420 Dixie Terminal

Building, Cincinnati, Ohio, and was designated in the will of Anna S. Taft, and appointed by the Probate Court of Hamilton County as the executor of her estate (a certified copy of the letters of administration is attached hereto marked "Exhibit A"). Anna S. Taft (hereinafter called "Mrs. Taft") was a citizen of the United States, a resident of Cincinnati, Ohio, and died January 31, 1931.

2. The notice of deficiency (a copy of which is attached hereto marked "Exhibit B") was mailed to the petitioner on September 22, 1934.

3. The tax in controversy is the estate tax and the amount of tax in controversy is $1,625,277.45 (without allowance being made for credit for Ohio Inheritance tax paid). On October 23, 1934, your petitioner mailed to the respondent a waiver of restriction on the immediate assessment and collection of $273,662.20 of the deficiency as assessed (being the net amount of the deficiency after allowing the full 80% credit for Ohio Inheritance taxes), together with any interest applicable thereto as provided by law, upon the condition, however, that he did not thereby waive his right to file this petition and upon the further condition that he be refunded any portion of said sum which may be determined by this Board to be an overpayment (a copy of this waiver is attached hereto, marked "Exhibit C"). Thereafter said assessment was made and on November 26, 1934, your peti-
[fol. 5] tioner paid the Collector of Internal Revenue at Cincinnati said $273,662.20 and $45,795.30 interest.

4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a) The respondent erred in his determination that certain securities, which Mrs. Taft transferred to National Bank of Commerce in New York under declaration of trust dated March 13, 1924, (excluding therefrom, however, certain securities covered by amendments to such declaration of trust dated December 26, 1929, and April 17, 1930) valued on January 31, 1931, at $5,542,552.20, should be included in the gross estate subject to taxation.

(b) Respondent erred in his determination that the following claims against said estate should not be deducted from the value of the gross estate:

Schedule I

Item	Obligee		Amount
66	Patristic Commission of the Prussian Academy of Sciences		$12,500.00*
70	Cincinnati Institute of Fine Arts—Art Museum pledge		22,500.00
71	Cincinnati Institute of Fine Arts—Salary of Walter Siple		5,000.00**
72	Cincinnati Institute of Fine Arts—Symphony Orchestra—		
	Maintenance	$125,000.00	
	Salary	3,920.00	128,920.00
73	Christ Church, Cincinnati, Ohio		4,125.00
74	Community Chest of Cincinnati		7,875.00
75	Community Chest of Cincinnati		44,000.00
76	University of Cincinnati—		
	Taft Memorial	$2,000,000.00	
	Salary Agreements	3,400.00	2,003,400.00
78	Cincinnati Institute of Fine Arts—		
	(a) Bertha Baur Annuity		63,171.60
	(b) George Baur Annuity		20,738.94
	(c) Conservatory of Music		54,106.69
			$2,366,337.23

* This item is now changed to be $13,000. See Par. 5(b).
** This item is now claimed to be $10,000. See Par. 5(c).

[fol. 6] (c) Respondent erred in his determination that petitioner should not be allowed a credit for payment of Ohio Inheritance taxes in the sum of $346,906.42.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) On March 13, 1924, Mrs. Taft transferred to the National Bank of Commerce in New York a number of securities under a declaration of trust which contained the following provision with respect to the duties of the trustee:

"To collect the income from said securities, to pay the expenses of the trust, and to pay the entire net income of said trust fund during the life of the Donor to her or as she may direct; in case of her death, said entire net income shall be paid to Charles P. Taft during his life; and on the

death of the survivor of the Donor and Charles P. Taft, the Trustee shall assign and transfer the whole of said trust fund as then invested, together with all accumulations of income remaining in its hands to the daughters of the Donor, Jane Taft Ingalls and Louise Taft Semple, in equal parts, but in case one or both of said daughters should not be living at that time, then the share which would have gone to the daughter had she survived the Donor and Charles P. Taft shall be paid to such person or persons other than the Donor as the Donor may appoint in writing deposited with the Trustee, and in default of appointment to the issue of the daughter who would have received said share in equal parts per stirpes, but if there are none of her issue living, to her next of kin."

This declaration of trust was entered into in order that Mrs. Taft would not have to pay an annual personal property tax of more than 2% on the full value of these securities to the State of Ohio, and was not made in contemplation of death, or to take effect in possession or enjoyment at death. Mr. and Mrs. Taft, by deeds of gift, later transferred to their daughters, Louise Taft Semple and Jane Taft Ingalls, all of their life interest under the trust in certain of the securities, and the respondent admits that the securities included in these deeds of gift are not taxable under the estate tax as part of the gross estate of Mrs. Taft. Charles P. Taft, the husband of Mrs. Taft, died on [fol. 7] December 31, 1929, and when Mrs. Taft died on January 31, 1931, both of her daughters, Jane Taft Ingalls and Louise Taft Semple, survived her, so that Mrs. Taft never had in her lifetime the power to designate who should receive the remainder interest in the trust after her death.

Item 66. Patristic Commission Contract.

(b) On February 27, 1930, Mrs. Taft entered into a contract with the Patristic Commission of the Prussian Academy of Sciences, Robert Casey, a professor in the University of Cincinnati, and Hans Lietzmann, a professor in the University of Berlin, by which the two professors agreed to prepare and edit an authoritative edition of Athanasius, and the Patristic Commission agreed to print the edition when ready and to pay toward the cost of such printing the sum of $5,000, and Mrs. Taft agreed to pay not more than $10,000 toward the cost of

printing the edition, and not more than $5,000 toward the cost of certain expeditions which it was necessary for the professors to take in preparing the edition. Mrs. Taft paid $2,000 on this contract for said expeditions prior to her death and a balance of $13,000 was owing at the date of her death. The petitioner has paid an additional $3,000 for the expeditions and 1334 reich marks (or approximately $537.60) as its share of the cost of publication of the first volume of the work.

Item 70. Cincinnati Institute of Fine Arts—Fund for Art Museum.

Item 71. Cincinnati Institute of Fine Arts—Walter Siple Salary.

(c) On June 3, 1929, Mrs. Taft, who had already conveyed her collection of pictures and her residence to the Cincinnati Institute of Fine Arts (see Item 72 for a more complete statement of this agreement and conveyance), with the understanding that she should have the use of the house and pictures during her life, and that she would maintain the house and pictures during her life, without cost to the Institute, wrote to the Institute that she had arranged to make a bequest of $1,000,000 to the Institute, the income from which was to be devoted to the maintenance of her house and collections, and the payment of the salary of a curator and other employees; that in the meantime she was interested in having the Institute and The Cincinnati Art Museum Association make a united effort to secure the recognition of Cincinnati as an artistic center; that she [fol. 8] believed this could be best accomplished by the appointment of a man of recognized ability in art as director of the Art Museum and director of art for the Institute; and further that she would contribute $10,000 per annum toward the salary of such a man. The Institute and the Art Museum, relying on this offer, offered the position to Mr. Walter Siple of the Fogg Art Museum of Harvard University at a salary of $10,000 per year. Mr. Siple agreed to accept such a position provided the Art Museum would secure a Five Year Fund of $40,000 per annum to be placed at his disposal for building up the Museum. The Cincinnati Institute of Fine Arts and The Cincinnati Art Museum Association accepted this condition and in the autumn of

1929 Mr. Siple was duly appointed Director of the Art Museum and Director of Art of the Institute. In accordance with the condition in Mr. Siple's acceptance of these positions, the Cincinnati Art Museum Association thereafter conducted a campaign to secure pledges for said Five Year Fund of $40,000 per year. On June 21, 1930, Mrs. Taft pledged $5,000 per year for five years to said fund contingent upon the Art Museum's securing total pledges of $40,000 per year. The Art Museum secured pledges in the total sum of $212,100 ($42,420 per year), and made expenditures and contracted for expenditures prior to Mrs. Taft's death, relying on said pledges. Prior to her death Mrs. Taft paid $2,500 on account of her said Five Year Pledge, and since her death your petitioner has paid to the Art Museum the sum of $22,500, the balance of said pledge. Prior to her death Mrs. Taft paid to the Institute $10,000 in payment of Mr. Siple's salary for the year 1929-1930, and $5,000 in payment of one-half of Mr. Siple's salary for the year 1930-1931. Since Mrs. Taft's death your petitioner has paid to the Institute the sum of $10,000 for Mr. Siple's salary for the last half of 1930-1931 and up to February 1, 1932, at which time the income from the million dollar bequest contained in the codicil to Mrs. Taft's will became available to pay the salary of Mr. Siple.

72. Cincinnati Institute of Fine Arts—Cincinnati Symphony Orchestra Five Year Pledge.

(d) On May 21, 1927, Mrs. Taft and her husband, Charles P. Taft, deeded to the Cincinnati Institute of Fine Arts, a corporation not for profit, organized under the laws of Ohio exclusively for charitable and educational purposes and for the encouragement of art, their collection [fol. 9] of oil paintings and other pictures, and their residence property, and agreed to pay to the Institute the sum of $1,000,000 before October 1, 1927, as an endowment for the Cincinnati Symphony Orchestra, on condition that there be contributed by others to the Institute, as a permanent endowment, the additional sum of $2,500,000, and on condition that the Institute take over and operate the Cincinnati Symphony Orchestra. At the time of execution of said deed of gift, because the raising of as large a sum as $2,500,000 could only be obtained by spreading the subscriptions over a five year period, during which time the

Cincinnati Symphony Orchestra would not have a sufficient amount of money upon which to operate, Mrs. Taft stated orally to the Board of Directors of the Cincinnati Institute of Fine Arts that if they would undertake this campaign and carry it through to a successful conclusion, she would, in addition to the promises made in the deed of gift, pay to the Cincinnati Institute of Fine Arts the sum of $50,000 per annum for a period of five years for the support of the Cincinnati Symphony Orchestra during the time that the permanent endowment fund was being collected.

(e) The Cincinnati Institute of Fine Arts, during the fall of 1927, conducted a public campaign and secured pledges and subscriptions in the total sum of $2,709,370.10. These subscriptions were obtained in reliance on said promises made by Mr. and Mrs. Taft in the deed of gift and orally. Prior to January 1, 1929, the president of the Cincinnati Institute of Fine Arts certified that the conditions of the deed of gift had been complied with in accordance with paragraph (c) of said deed of gift, the deed of gift was recorded, and the sum of $1,000,000 was paid by Mr. and Mrs. Taft to the Cincinnati Institute of Fine Arts.

(f) In accordance with said deed of gift the Cincinnati Institute of Fine Arts also took over the operation of the Cincinnati Symphony Orchestra, and Mrs. Taft, prior to her death, paid to the Institute the sum of $125,000 on account of the promise to contribute $50,000 per annum for five years to the support of the Orchestra. Your petition- has paid to the Cincinnati Institute of Fine Arts, since Mrs. Taft's death, the sum of $125,000 on account of the balance due under said agreement.

[fol. 10] Item 72. Cincinnati Institute of Fine Arts—Cincinnati Symphony Orchestra Salary Agreements.

(g) At the beginning of the season 1929-1930, the Board of Trustees of the Cincinnati Symphony Orchestra, determined that the number of men employed by the Orchestra would have to be reduced in order to balance its budget. At the request of Mr. Fritz Reiner, then the director of the Orchestra, that one additional man be engaged over and above the budgeted number, Mrs. Taft notified the Cincinnati Symphony Orchestra that if they would employ such additional player at a salary of $3920, she would pay that

salary. The Institute accepted this offer of Mrs. Taft and employed the additional player, and Mrs. Taft paid his salary of $3920. At the beginning of the 1930-1931 season, she orally renewed her agreement to pay the salary of said additional player, an- the Board of Trustees of the Cincinnati Symphony Orchestra, relying on said promise, engaged said additional player and paid him a salary of $3920, for which they were not reimbursed during the lifetime of Mrs. Taft. Since Mrs. Taft's death your petitioner has paid said sum of $3920 to the Cincinnati Symphony Orchestra.

Item 73. Christ Church, Cincinnati, Ohio, Pledges.

(h) Shortly prior to December 9, 1930, Miss Mary Walsh, Mrs. Taft's private secretary, acting for Mrs. Taft, pledged to Frank H. Nelson, rector of Christ Church, that Mrs. Taft would pay $3800 toward the Christ Church Parish budget for the year 1931, and $1700 toward the Nation-Wide Campaign Fund of Christ Church. This action was ratified by Mrs. Taft on December 9, 1930, and on that date Miss Walsh so notified Mr. Nelson. Relying on said pledges and other similar pledges, Christ Church made expenditures and contracted for expenditures prior to Mrs. Taft's death, and the National Council of the Protestant Episcopal Church in the United States of America and the Diocese of Southern Ohio likewise relying to said pledges and other similar pledges, made expenditures and contracted for expenditures prior to Mrs. Taft's death. No part of said pledges were paid prior to Mrs. Taft's death, and since her death your petitioner has paid to Christ Church, on account of said pledge, the sum of $4125.

[fol. 11] Item 74. Community Chest of Cincinnati (1930 Pledge).

(i) On April 17, 1930, Mrs. Taft pledged the sum of $31,500 to the Community Chest of Cincinnati as a part of its annual campaign among the residents of Cincinnati to provide funds with which to support practically all of the charitable organizations in the City. Relying on this pledge and other similar pledges, the Community Chest of Cincinnati made expenditures and contracted for expenditures prior to Mrs. Taft's death. At the date of Mrs. Taft's death there was a balance due on this pledge in the sum of $7875 which your petitioner has since paid.

Item 75. Community Chest of Cincinnati (1931 Pledges).

(j) On January 31, 1931, Mrs. Taft made two pledges to said Community Chest of Cincinnati, one for $31,500 and the other for $12,500, in connection with 1931 campaign of said Community Chest. Relying on said pledges and other similar pledges, the Community Chest of Cincinnati had, prior to Mrs. Taft's death, made expenditures and contracted for expenditures. At the date of Mrs. Taft's death no part of these pledges had been paid. Your petitioner has since paid to the Community Chest the sum of $44,000 on account of said two pledges.

Item 76. University of Cincinnati.

(k) On May 3, 1930, Mrs. Taft offered to establish a fund for the University of Cincinnati to be known as the Charles Phelps Taft Memorial Fund in memory of her husband. This offer provided that she would make available for the University the sum of $50,000 during the ensuing year, $75,000 during the following year, and in each year thereafter the sum of $100,000, or such other income as might be derived from a fund of $2,000,000 which she agreed to ultimately transfer to certain trustees. She further agreed that pending the complete transfer of the principal of the fund, she would guarantee all obligations within the limits of the income above set out. The offer of this fund was accepted by the University on May 6, 1930. In accordance with this agreement, Mrs. Taft paid to the trustees named in her offer on or about October 1, 1930, the sum of $50,000 in cash, and the Board of Trustees also organized on that date. Since Mrs. Taft's death your petitioner has made available to the trustees the income provided for in Mrs. Taft's let-
[fol. 12] ter, and proposes, within the near future, to pay over the principal amount of $2,000,000.

(l) In 1922 Mrs. Taft offered to the University of Cincinnati that if it would increase the salary of Louis T. More, professor of physics and dean of the Graduate School by the sum of $1,900 per year, she would pay to the University the amount of this increased salary. The University accepted this offer and paid to Mr. More the increased salary each year thereafter, and Mrs. Taft paid this amount to the University each year. At the date of Mrs. Taft's death there was owing, on account of this agreement with the Uni-

versity, the sum of $1,900 for Mr. More's salary for the year 1930-31, which your petitioner has since paid.

(m) In 1928 Mrs. Taft offered to the University that if it would employ Mr. Thomas James Kelly as lecturer in the University of Cincinnati, at a salary of $3,000 per year, she would pay the amount of such salary. Relying on this offer the University did appoint Mr. Kelly as lecturer at a salary of $3,000 per year, and at the date of Mrs. Taft's death there was owing to the University of Cincinnati, on account of such salary, the sum of $1,500, which the petitioner has since paid.

Item 78. (a), (b) and (c). Cincinnati Institute of Fine Arts—Cincinnati Conservatory of Music Agreement.

(n) Prior to July 8, 1930, the Cincinnati Institute of Fine Arts and Miss Bertha Baur had certain meetings with reference to the Institute taking over from her the Cincinnati Conservatory of Music. This Conservatory was being run by the Cincinnati Conservatory of Music Company, a corporation for profit which Miss Bertha Baur controlled. Miss Baur had put all the profits back into the company and so had no means of support except her income from the Conservatory. Furthermore, the Conservatory, which had once been a profitable company, had, during the past few years, been losing money. As the Institute did not have sufficient income to provide a salary for Miss Baur and her cousin, George Baur, and also to stand a deficit at the Conservatory, they were unwilling to take it over. On July 8, 1930, Miss Baur formally offered to turn over to the Institute all her common stock in the Cincinnati Conservatory of Music Company, on condition that the Institute provide for her and her cousin, George Baur, who had also been supported by a salary at the Conservatory, a reasonable income for their [fol. 13] lives, and continue to operate the Conservatory as a corporation not for profit. At the same time Mrs. Taft offered to the Institute that if it would take over the operation of the Conservatory upon the conditions set forth in Miss Baur's offer, she would pay to the Institute $10,000 per year during the life of Miss Baur, and $3,000 per year during the life of Mr. Baur, and that she would undertake to "see that the liabilities of the company do not exceed its quick assets." By reason of and in reliance upon Mrs. Taft's offer, the Institute accepted the offer of Miss Baur

and took over the Conservatory, and has run it since that time. At the date of Mrs. Taft's death Miss Baur was seventy years of age and Mr. Baur was sixty-eight years of age so that the yearly payments to them were worth $63,-171.60 and $20,738.94 at the time of Mrs. Taft's death. Since Mrs. Taft's death your petitioner has continued to make these annual payments of $10,000 and $3,000 respectively to the Institute.

(o) Prior to her death, Mrs. Taft paid $60,000 on account of her obligation to see that the liabilities of the Conservatory did not exceed its quick assets, and since her death, your petitioner and the Institute agreed that $54,106.69 was still owed on this obligation, which your petitioner has since paid.

(p) Your petitioner has paid to the treasurer of Hamilton County Ohio, on account of the Ohio Inheritance tax, the sum of $346,906.42.

Wherefore the petitioner prays that this Board may hear the proceeding and determine that said securities transferred by Mrs. Taft, under declaration of trust dated March 13, 1924, should not be included in the gross estate subject to estate tax; that said claims against the estate should be allowed as deductions in determining the net estate, subject to the estate tax; that due credit be allowed for Ohio Inheritance taxes paid; that the liability of your petitioner for additional estate tax should be redetermined accordingly; and that the overpayment of the tax as so redetermined, together with any interest properly applicable thereto, as provided by law, be ordered to be refunded.

(Signed) Robert A. Taft, Counsel for Petitioner,
420 Dixie Terminal Building, Cincinnati, Ohio.

[fol. 14] *Duly sworn to by Robert A. Taft. Jurat omitted in printing.*

EXHIBIT "B" TO AMENDED PETITION

Treasury Department, Washington

MT-ET-C1-2337-1st Ohio.
Estate of Anna Sinton Taft.
Date of death January 31, 1931.

Sept. 22, 1934.

Robert A. Taft, Executor, 424 Dixie Terminal Building, Cincinnati, Ohio.

SIR:

A deficiency of $1,627,585.28 in the Federal estate tax liability of the above-named estate has been determined after a review of the file in the case and a consideration of the protest against a deficiency proposed in a previous letter from this office. The determination of the deficiency and the action of this office on the protest are fully explained in the attached statement.

This notice of deficiency is given in accordance with the provisions of Section 308 (a) of the Revenue Act of 1926 as amended by Section 501 of the Revenue Act of 1934, and a [fol. 15] petition for a redetermination of the deficiency may be filed with the United States Board of Tax Appeals within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter. If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute and forward the enclosed Form 890, waiving the restrictions on the immediate assessment and collection of the deficiency.

The submission of the waiver will expedite the closing of this case and will also benefit the estate by preventing the accumulation of interest charges, as the interest period terminates 30 days after the filing of the waiver, or on the date of assessment, whichever is earlier. The signing of the waiver does not prejudice your right to file a claim for refund of all or any portion of the tax. If you desire to consent to the assessment and collection of only a part of the deficiency, the enclosed form of waiver should be executed in such partial amount.

If within the 90-day period a petition has not been filed with the United States Board of Tax Appeals or the waiver,

Form 890, has not been submitted, the deficiency will be thereafter assessed.

Respectfully, Guy T. Helvering, Commissioner; by D. S. Bliss, Deputy Commissioner.

Enclosures: Statement. Waiver, Form 890.

[fol. 16] Exhibit B

Estate of Anna Sinton Taft

The protest relates to the following items:

	Gross Estate		
	Returned	Tentatively determined	Determined
Real estate:			
Item 5	$62,420.00	$73,865.00	$62,420.00
Item 6	76,260.00	88,250.00	76,260.00
Stocks and Bonds:			
Item 13	622,800.00	692,000.00	657,400.00

The stock represented by the above item is adjusted to a value of $190.00 a share.

Mortgages, Notes, Cash, and Insurance:			
Accrued interest on Item 3	0.00	4,068.02	0.00
Item 6	27,000.00	30,150.00	22,500.00

The note of W. E. Fox and Company is adjusted to the value of the collateral security.

Transfers:			
Value of property involved in a trust created by the decedent on March 13, 1924, as amended, including notes of the Sinton Realty Company, and excluding the Value of the securities covered by the amendments to the trust dated December 26, 1929, and April 17, 1930.	0.00	6,720,130.37	5,542,552.20

The bureau holds that to the amount indicated above, the transfer was made in contemplation of death and was intended to take effect in possession or enjoyment at the death of the decedent, within the meaning of Section 302 (c) of the Revenue Act of 1926. Also it is held that the transfer comes within the provisions of Section 302 (d) of the Act.

[fol. 17]

	Deductions		
	Returned	Tentatively determined	Determined
Executor's commission and attorney's fee	$160,000.00	$42,500.00	$160,000.00
Miscellaneous administration expenses	23,571.41	13,006.39	23,628.44
	4,247,348.81	1,015,378.74	1,861,015.22

A deduction is allowed for executor's commission and attorney's fee in the amount agreed upon to be paid. An additional deduction is allowed for miscellaneous administration expenses in accordance with the affidavit of H. V. Fetick dated February 6, 1934.

Adjustments are made under the schedule "Debts of decedent" as follows:

Item 66	12,500.00	12,500.00	0.00
Item 67	1,165,000.00	0.00	1,165,000.00
Item 69	12,886.26	0.00	12,598.71
Item 70	22,500.00	22,500.00	0.00
Item 71	5,000.00	5,000.00	0.00
Item 72	128,920.00	128,920.00	0.00
Item 73	4,125.00	4,125.00	0.00
Item 74	7,875.00	7,875.00	0.00
Item 75	44,000.00	44,000.00	0.00
Item 76	2,003,100.00	3,400.00	0.00
Item 77	144,000.00	45,625.00	80,000.00
Item 78(a)	63,171.60	63,171.60	0.00
Item 78(b)	20,738.94	20,738.94	0.00
Item 78(c)	20,988.74	54,106.69	0.00

Items 66, 70, 71, 72, 73, 74, 75, 76, and 78, representing the amounts due on subscriptions, pledges, and agreements made by the decedent to charitable, religious, and educational organizations are disallowed for the reason that the obligations were not contracted for an adequate and full consideration in money or money's worth and are, therefore, not deductible under the provisions of Section 303 (a) (1) of the Revenue Act of 1926. In this connection see Glaser, et al. v. Commissioner, 69 Fed. (2d) 254.

Evidence has been submitted showing the payment of Ohio inheritance taxes in the sum of $346,906.42. However, [fol. 18] the record in this case indicates that an appeal has been taken by the executor against the determination of such taxes and no credit is allowed at this time.

The following computation shows the estate tax liability of this estate, which is hereby made final:

	Returned	Tentatively determined	Determined
Gross Estate	$9,257,101.80	$16,115,807.80	$14,868.476.61
Deductions	5,560,233.90	2,200,198.81	3,173,957.34
Net Estate	$3,696,867.90	$13,915,608.99	$11,694,519.27
Gross tax	$324,092.83	$2,136,621.80	$1,692,403.85
Credit for State, estate, inheritance, legacy, or succession taxes	259,274.26	0.00	0.00
Net tax	$64,818.57	$2,136,621.80	$1,692,403.85
Deficiency			$1,627,585.28

If the full 80% credit for State estate, inheritance, legacy, or succession taxes is allowed the net deficiency will be $273,662.20. Execution of the enclosed waiver will enable the Bureau to assess the full amount of the probable net tax.

The deficiency bears interest at the rate of six per cent per annum from one year after decedent's death to the date of assessment, or to the thirtieth day after the filing of a waiver of the restrictions on the assessment, whichever is the earlier.

[fol. 19] BEFORE UNITED STATES BOARD OF TAX APPEALS

ANSWER TO AMENDED PETITION—Filed March 12, 1935

Comes now the respondent, by his attorney, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, and for answer to the amended petition in the above named case, admits and denies as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the amended petition.

3. Admits that the tax in controversy is the estate tax and that on October 23, 1934, the petitioner mailed to the respondent a waiver of restrictions on the assessment and collection of $273,662.20 of the assessed deficiency. Denies the remaining allegations contained in paragraph 3 of the amended petition.

4(a), (b), and (c). Denies the allegations contained in subdivisions (a), (b), and (c), of paragraph 4 of the amended petition.

5(a) to (o), inclusive. Denies the allegations contained in subdivisions (a) to (o), inclusive, of paragraph 5 of the amended petition.

(p) Admits the allegation of fact contained in subdivision (p) of paragraph 5 of the amended petition.

Denies generally and specifically each and every allegation contained in the amended petition not heretofore admitted, qualified, or denied.

Wherefore, it is prayed that the petitioner's appeal be denied.

(Signed) Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue.

Of Counsel: E. C. Algire, Lloyd B. Harrison, Special Attorneys, Bureau of Internal Revenue.

[fol. 20] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 77923

1. A transfer in trust made solely to avoid annual state property taxes, held, not made in contemplation of death.

2. A transfer in trust in which the settlor reserved the right to income for life and a contingent right to appoint in case of her survival of a beneficiary, which did not occur, held, not one to take effect in possession or enjoyment at or after death and not within section 302 (d), Revenue Act of 1926.

3. A claim based upon a contractural promise, partially executed, to transfer an amount to an educational corporation, held, not incurred for an adequate and full consideration in money or money's worth.

4. A payment made by an executor in fulfillment of decedent's contractural promise to transfer the amount to an educational corporation, held, not a transfer within the meaning of section 303 (a) (3), Revenue Act of 1926.

5. Decedent's promises to contribute to educational, religious and charitable corporations in consideration of the subscriptions of others, held, deductible from gross estate as claims incurred for an adequate and full consideration in money or money's worth. Sec.

303 (a) (1), Revenue Act of 1926. Jeptha H. Wade, Jr., et al., Executors, 21 B. T. A. 339, followed.

6. Amounts paid by an executor pursuant to decedent's independent promise to contribute for two years to an educational corporation, held, not a claim based on money or money's worth under section 303 (a) (1), Revenue Act of 1926.

7. Pursuant to a tripartite agreement of decedent, another individual and an educational corporation, decedent agreed to pay to the corporation annuities to be paid to the individual and an ascertainable amount of cash in consideration of the individual's transfer of stock to the corporation, the corporation's acceptance thereof, and the corporation's promise to pay the annuities. The cash paid by the executor and the value of the annuities at decedent's death, held, deductible from gross estate as claims incurred for an adequate and full consideration in money or money's worth. Sec. 303 (a) (1), Revenue Act of 1926.

8. Amounts paid and payable by the executor of a decedent's estate pursuant to a contract made by the decedent, an academy and two professors for preparing and publishing an edition of Athanasius, held, deductible from gross estate as claims incurred for an adequate and full consideration in money or money's worth. Sec. 303 (a) (1), Revenue Act of 1926.

Charles P. Taft, 2nd, Esq., Robert A. Taft, Esq., and John H. More, Esq., for the petitioner.

E. C. Algire, Esq., and Lloyd B. Harrison, Esq., for the respondent.

FINDINGS OF FACT AND OPINION—Promulgated December 10, 1935

STERNHAGEN:

Respondent determined a deficiency of $1,627,585.28 in estate tax. He included in gross estate the value of property in a trust created by decedent for the benefit of her children, and he disallowed the deduction of several amounts paid by [fol. 21] her executor because of promises made by decedent during her life.

I

Findings of Fact.—Anna Sinton Taft died suddenly on January 31, 1931, aged seventy-nine. On March 13, 1924, she created an irrevocable trust, naming a New York bank as trustee, to which she transferred securities. At the time of her death the value of the trust property was $5,542,552.20. The transfer of the aforesaid property in trust was not made in contemplation of death. It was made solely to avoid or reduce her Ohio taxes. By the terms of the trust instrument, the income was to be paid by the trustee to the settlor for life, then to her husband for life, if he survived her. On the death of the survivor, the trust property was to go in equal shares to her two daughters. If either daughter predeceased the settlor, the settlor might appoint someone other than herself to receive such share, upon failure of such appointment, such share to go to the issue of such deceased daughter.

On April 25, 1924, by deed of gift, the decedent settlor and her husband transferred to their two daughters all their interest in a certain note held by the trustee and directed the trustee to pay the income therefrom to the two daughters. The value of this note at the time of decedent's death was $141,500.

Decedent's husband died in 1929. Her two daughters survived her.

Opinion.—The respondent has determined, under Revenue Act of 1926, section 302 (c) (d)[1] that the transfer in trust

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[1] Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Where within two years prior to his death but after the enactment of this Act and without such a consideration the decedent has made a transfer or transfers, by trust or otherwise, of any of his property, or

[fol. 22] was in contemplation of or intended to take effect in possession or enjoyment at or after her death or that the enjoyment thereof was subject at the date of her death to change by the exercise of a power to alter, amend or revoke.

Since the question whether the transfer was in contemplation of death is purely a fact question, the evidence has been considered and weighed to determine whether there is suffi-

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an interest therein, not admitted or shown to have been made in contemplation of or intended to take effect in possession or enjoyment at or after his death, and the value or aggregate value, at the time of such death, of the property or interest so transferred to any one person is in excess of $5,000, then, to the extent of such excess such transfer or transfers shall be deemed and held to have been made in contemplation of death within the meaning of this title. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death but prior to the enactment of this act, without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. The relinquishment of any such power, not admitted or shown to have been in contemplation of the decedent's death, made within two years prior to his death but after the enactment of this Act without such a consideration and affecting the interest or interests (whether arising from one or more transfers or the creation of one or more trusts) of any one beneficiary of a value or aggregate value, at the time of such death, in excess of $5,000, then, to the extent of such excess, such relinquishment or relinquishments shall be deemed and held to have been made in contemplation of death within the meaning of this title.

cient to outweigh the Commissioner's determination that it was. This consideration has been guided principally by United States v. Wells, 283 U. S. 102. Neither the prospect of death nor of Federal Estate tax was a moving cause of the transfer. They were not in the decedent's mind. She was moved by the thought that if she continued to hold the securities in Ohio she was faced with problems of Ohio property taxes which impinged annually during her life. So, upon her counsel's advice, she moved this property to New York and placed it in trust there. If there were any evidence that death or death duties or a testamentary transfer was a concomitant thought or consideration, this would perhaps support the finding that the Government seeks, notwithstanding the thought of Ohio taxes, Farmers Loan & Trust Co. v. Bowers, 68 Fed. (2d) 916. But Ohio taxes were the only consideration, and this disproves the Commissioner's determination. Cf. Becker v. St. Louis Union Trust Co., — U. S. — (Nov. 11, 1935).

Whether the transfer was to take effect in possession or enjoyment at or after death, as the Commissioner has de- [fol. 23] termined, is a question which in varying circumstances has been so frequently and fully considered that there is little more to be said by way of exposition. The question in this case comes down to whether the settlor's right to the income for her life and the contingent right to appoint as to corpus in the event of the death of a daughter is enough to bring the transfer within the tax act. The decisions support the petitioner's view that the transfer was not one to take effect in possession or enjoyment at or after death. Reinecke v. Northern Trust Co., 278 U. S. 339; May v. Heiner, 281 U. S. 238; Morsman v. Burnet, 283 U. S. 783; McCormick v. Burnet, 283 U. S. 784; Helvering v. Duke, 290 U. S. 591; Helvering v. Helmholz, — U. S. — (Nov. 11, 1935); Helvering v. St. Louis Union Trust Co., — U. S. — (Nov. 11, 1935); Becker v. St. Louis Union Trust Co., — U. S. — (Nov. 11, 1935). These decisions also take the case out of section 302 (d), since the only power which the settlor reserved to alter or amend was contingent upon her survival of one of the daughters, and the contingency had not occurred, Helvering v. St. Louis Union Trust Co., — U. S. — (Nov. 11, 1935).

The decision as to the trust includes the property which was covered by the deed of gift of April 25, 1924, but since by that gift the income as well as the principal of the note

was irrevocably transferred, it is a fortiori not within the gross estate.

The respondent's determination is reversed as to the $5,542,552.20, and the trust property should not be included in the decedent's gross estate.

II

Findings of Fact.—In May 1930 the decedent made an offer, which the University of Cincinnati immediately accepted, to establish the Charles Phelps Taft Memorial Fund for use in teaching the humanities, to which she expected "ultimately" to transfer $2,000,000, and meanwhile amounts equivalent to the income of such a fund. The trust was formed, and $50,000 was given to it in October 1930, of which $33,800 was appropriated in December 1930 by the trustees to specific uses by the university, $11,753.83 being actually spent by the university before decedent's death. Thereafter the present petitioner, decedent's executor, paid amounts from time to time to the trust fund calculated as interest at prevailing rates upon the $2,000,000.

[fol. 24] Opinion.—The petitioner, on his return, deducted $2,000,000, and the Commissioner disallowed the deduction. There is no dispute of the proposition that the University of Cincinnati is a charitable and educational corporation, a direct bequest to which would be a deduction under the Revenue Act of 1926, section 303 (a) (3).[2] But this was

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[2] Sec. 303. For the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a resident, by deducting from the value of the gross estate—

* * * * * * *

(3) The amount of all bequests, legacies, devises, or transfers, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stock-

not a bequest found in decedent's will, but a payment to be made by the executor in fulfillment of her contractual promise..

Petitioner argues that the $2,000,000 fund is deductible on two grounds, (a) it is a "claim against the estate * * * incurred or contracted bona fide, and for an adequate and full consideration in money or money's worth" (sec. 303 (a) (1)); and (b) it is "the amount of a transfer * * * for the use of" a charitable, etc., corporation (sec. 303 (a) (3)).

(a) There is no suggestion that the $2,000,000 was not a valid claim against the estate or that it was not incurred or contracted bona fide. The controversy turns upon whether it was "for an adequate and full consideration in money or money's worth." It may be assumed that the intendment of the statute was a liberal encouragement of charitable benefactions. When made during life they have always served to reduce individual income tax, and when made as testamentary transfers they have been permitted without limit to reduce estate tax. Whenever there is ambiguity or otherwise room for construction of the statute, such construction should be shaped to protect and promote this clear liberal purpose. Trinidad v. Sagrada Orden de [fol. 25] Predicadores, 263 U. S. 578. But as Congress has the power to be liberal in enacting such deductions, it has also the power to state their limits. When such limits are stated clearly, they command; and no one may disregard them to make the liberality gr-ater than its terms and clear implications justify. These precepts are well known and there has never been cause to question them. Taxpayers and tax administrators must be assumed to have long since adjusted their affairs consistently with them.

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holder or individual, or to a trustee or trustees, or a fraternal society, order, or association operating under the lodge system, but only if such contributions or gifts are to be used by such trustee or trustees, or by such fraternal society, order, or association, exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals. The amount of the deduction under this paragraph for any transfer shall not exceed the value of the transferred property required to be included in the gross estate; * * *

We find it impossible to hold that the decedent's obligation of $2,000,000 was for a consideration in money or money's worth. Certainly it was not if we give the statutory language a plain and simple meaning. And there are no circumstances surrounding its enactment or its administration or effect to require a different or "technical" meaning.

It has been held that a money pledge supported by similar pledges of others was deductible within the statute, Jeptha H. Wade, Jr., et al., Executors, 21 B. T. A. 339; Frances Plumer McIlhenny et al., Executors, 22 B. T. A. 1093, 1105; David A. Reed et al., Executors, 24 B. T. A. 166, 172. This is not such a case, for here neither the donee nor anyone else was giving to decedent or to anyone else anything of monetary value as a consideration for her promise. See James Turner et al., Executors, 31 B. T. A. 446. Its acceptance and the donee's act in reliance upon it may be consideration and may thus serve to bind her and her estate. Cf. Porter v. Commissioner, 60 Fed. (2d) 673, 675. But this is not all the statute requires; it is not money or money's worth.

The Wade case must be held within narrow scope. In the Sixth Circuit, the limitation of money or money's worth has been strictly adhered to as to a noncharitable claim, Latty v. Commissioner, 62 Fed. (2d) 952; see also Central Union Trust Co. of New York et al., Executors, 24 B. T. A. 296; and the Second and Eighth Circuits have held that the limitation is applicable no less to charitable claims, Porter v. Commissioner, supra; Glaser v. Commissioner, 69 Fed. (2d) 254; see also Charles B. Bretzfelder et al., Executors, 32 B. T. A. 146; cf. United States v. Mitchell, 74 Fed. (2d) 571.

(b) We are also of opinion that there was no transfer of the $2,000,000 within the meaning of subdivision (3). So far as this record shows, there has never been a transfer of the amount, but only a promise to "ultimately arrange [fol. 26] to transfer" it to the trustees. Such promise is not a transfer, and we continue to doubt (cf. Charles B. Bretzfelder et al., Executors, supra) that when the transfer is made by the executor it can be called testamentary by relating it back to the death rather than inter vivos by relating it to the earlier promise. Generally speaking, the intendment of the statute in placing the word "transfer"

with bequests, legacies and devises is that since life transfers made, say, in contemplation of death, etc., are included in gross estate though not strictly bequests, legacies or devises, so such transfers made to the described charities shall be no less deductible than similar bequests, legacies and devises. Thus property actually transferred by a decedent a year before death to a charity and held to be transferred in contemplation of death would be within the gross estate and at the same time among the permitted deductions. Whether this indicates the limits of the application of the word in subdivision (3) needs not to be answered now. Cf. Fourth National Bank v. United States (U. S. Dist. Ct., Kansas), C. C. H., vol. III—A, 1934, p. 10161. Sufficient it is that no convincing reason is given for expanding it to embrace an antecedent promise such as this, and we may not permit ourselves to be moved by our approval of the decedent's philanthropy.

The respondent's disallowance of the deduction of $2,000,000 is sustained.

III

Findings of Fact.—On June 21, 1930, decedent promised, in consideration of the subscriptions of others, to pay $5,000 a year for five years to the Cincinnati Museum Association for its current expenses, contingent upon subscriptions of $40,000 a year from others. The $40,000 was subscribed. Decedent, before her death, paid $2,500, and her executor has since paid the rest. The association is a corporation organized and operated exclusively for educational purposes.

Opinion.—The petitioner deducted $22,500 as a claim deductible under section 303 (a) (1), and the respondent disallowed the deduction. The facts bring it squarely within Jeptha H. Wade, Jr., et al., Executors, supra, in which the claim of a charity based upon monetary pledges of others was held to be for an adequate and full consideration in money or money's worth. Within these limits the opinion [fol. 27] has been since adhered to, Frances Plumer McIlhenny et al., Executors, supra; David A. Reed et al., Executors, supra; cf. James Turner et al., Executors, supra.

The deduction is proper and the respondent's disallowance is reversed.

IV

Findings of Fact.—During her life, the decedent, to some extent modifying the terms of an arrangement made in 1927 by her and her husband for a substantial gift to the Cincinnati Institute of Fine Arts, promised an additional $50,000 a year for five years for the support of the Cincinnati Symphony Orchestra if $2,500,000 were subscribed by others. The campaign for such subscriptions succeeded, and in fulfillment of her promise the decedent during her lifetime paid $125,000 to the Institute for the support of the orchestra. The remaining $125,000 has since her death been paid by petitioner, as her executor, in periodic payments.

Opinion.—This claim against the estate for the remaining $125,000 is in all respects similar to the foregoing claim of the Museum Association, and its deductibility is also sustained by Jeptha H. Wade, Jr., et al., Executors, supra.

The Commissioner's disallowance is reversed.

V

Findings of Fact.—Before her death, decedent had promised to contribute to the Cincinnati Institute of Fine Arts $3,920 each year for two years, to be used to pay the compensation of two musicians in the Symphony Orchestra who would otherwise have been dropped from the orchestra for want of sufficient funds to pay them. She paid the first $3,920 before her death, and the petitioner, as her executor, paid the second $3,920 after her death.

Opinion.—This claim, although its validity and enforceability are not questioned, is not based on money or money's worth. Nor is it based on the money promises of others within the rule of Jeptha H. Wade, Jr., et al., Executors, supra.

The Commissioner's disallowance is sustained.

[fol. 28]

VI

Findings of Fact.—During her life the decedent pledged $5,500 to Christ Church, her pledge being one of several hundred. Before her death decedent paid $1,375, and after

her death petitioner, as her executor, paid the remaining $4,125.

Opinion.—This $4,125 claim against the estate is deductible within the rule of Jeptha H. Wade, Jr., et al., Executors, supra.

The Commissioner's disallowance is reversed.

VII

Findings of Fact.—Before her death decedent, on several pledges made in consideration of the pledges of others, had promised the Community Chest for the support of Cincinnati charitable organizations $31,500 for 1930 and $44,000 for 1931. Before her death she had paid all but $7,875 of the 1930 pledge, leaving unpaid also the $44,000 for 1931. This $51,875 was paid after her death by petitioner, as her executor.

Opinion.—This $51,875 is deductible as a claim against the estate within the rule of Jeptha H. Wade, Jr., et al., Executors, supra, and the Commissioner's disallowance is reversed.

VIII

Findings of Fact.—In July 1930, by contemporaneous writings of Bertha Baur, the Cincinnati Institute of Fine Arts, and the decedent, Bertha Baur agreed to transfer to the Institute her shares in the Cincinnati Conservatory of Music, a business corporation, and to advise as to the conservatory's future management, the decedent promised to make available to the Institute $10,000 a year to be paid to Bertha Baur and $3,000 a year to be paid to her cousin, and promised also that she would transfer sufficient funds to the Institute each year to assure the conservatory's quick assets being equal to its liabilities; and the Institute accepted these offers and thereupon reorganized the conservatory as a charitable corporation. Pursuant to this obligation the decedent made certain payments before her death, and since her death the petitioner, as her executor, has made periodic payments. Bertha Baur was at the time of decedent's death seventy years of age, and her cousin was sixty-eight. Calculated by the use of experience tables, the [fol. 29] value at the time of decedent's death of the prom-

ised payments to Bertha Baur was $63,171.60, and to her cousin $20,738.94. Decedent's agreement to see that the conservatory's liabilities did not exceed its quick assets when taken over by the institute amounted at the time of her death to $54,106.69.

Opinion.—So far as prior decisions indicate, this is an unique situation. The writings constitute an integration which may be regarded as a tripartite contract, the considerations operating equally upon all. Although the decedent did not actually receive in hand any money or money's worth, it seems clear that the consideration which bound her to her promise was an adequate and full consideration in money or money's worth. Bertha Baur, acting largely upon the decedent's promise to provide the funds with which the annuities of herself and her cousin should be paid, promised to and immediately did convey the conservatory property which had theretofore been her only source of livelihood. It consisted of shares of stock in a business corporation which owned the conservatory buildings and 10 acres of land, all of which had been conducted as a successful business. That this property was money's worth is not denied. It is, however, argued that, because no property came into decedent's hands and because decedent's promise was for the purpose of a charitable benefaction, it is not to be characterized as a "business transaction," and therefore not within the intendment of the statute. Cf. Glaser v. Commissioner, supra. Were this actuated by a strictly business motive, it would be deductible under United States v. Mitchell, supra, despite the fact that no money or property consideration came into the decedent's hands. The statute, however, omits a requirement that the consideration must enlarge the decedent's possessions, and requires only that the consideration for the claim against the decedent shall be adequate and full in money or money's worth. While this clearly includes an enlargement of the decedent's estate, a granting of a right or privilege, and a discharge of a contractual or tort claim, Latty v. Commissioner, supra, we think it might also include such unusual considerations as this. Indeed, it is probable that the contract gave to decedent a new right against Bertha Baur that she had not theretofore had, and thus the claim is

brought within the second of Judge Hickenlooper's enumerated classes.

[fol. 30] The Commissioner's disallowance of this item as a deduction is reversed.

IX

Findings of Fact.—By a written agreement of February 27, 1930, the decedent, the Patristic Commission of the Prussian Academy of Sciences and two professors agreed to prepare, print and publish an edition of Athanasius, and to make the necessary expeditions abroad for that purpose. Decedent was to pay the cost of the expeditions, not to exceed $5,000, and was to bear two thirds of the cost of printing, not to exceed $10,000. The academy was to have the book printed and to pay one third of the cost of printing, not to exceed $5,000. The professors were to do the work. Before her death decedent paid $2,000, and since her death the petitioner, as her executor, has paid $3,537.34, and is advised that the remainder of decedent's $15,000 obligation will be required.

Opinion.—The only question as to this item is whether the consideration for the claim is in money or money's worth. In our opinion, it is. Although the contract in evidence does not provide that decedent should receive anything tangible by way of consideration for her promise, it is, nevertheless, so far as this record shows, for her benefit that the services were to be performed and the book prepared and published. There is nothing to indicate that this was a benefaction to either the Prussian Academy or the two professors. In law there was simply a binding contract for services and payment. There is no evidence upon which it could be said that the services were not valuable to decedent or were less than an adequate and full consideration in money's worth. On the other hand, it is clear that they were.

The respondent's disallowance of the deduction is reversed.

X

Findings of Fact.—In a letter of June 3, 1929, to the president of the Cincinnati Institute of Fine Arts, the decedent promised to contribute $10,000 per annum toward the salary of a man to be employed by the institute as

director of art. Thereupon the institute engaged such a man. Before her death the decedent paid $10,000 which was used for the payment of such salary in 1930, and $5,000 [fol. 31] in 1931. After her death the petitioner, as her executor, paid $5,000 in 1931 as the remainder of what he regarded as the obligation for 1931, and in March 1932 paid $5,000 more.

Opinion.—This item is like that in regard to the amount paid to the symphony orchestra and used for compensation to the two musicians, considered in item V. It is, so far as the record shows, merely a beneficient promise by the decedent to the institute and can not be regarded as based upon an adequate and full consideration in money or money's worth.

The respondent correctly disallowed the deduction.

XI

Findings of Fact.—In 1930 the decedent promised the University of Cincinnati to pay $3,000, the amount of his salary, if the university would employ Professor Kelly to give a course in musical appreciation, a course which the university was not otherwise financially able to support. Kelly was employed and the decedent made five periodic payments of $300 to the university on this account during her lifetime, and the petitioner, as her executor, paid $1,500 on this account after her death.

Opinion.—So far as the record shows, this is governed by the same considerations as the preceding item, and the Commissioner's disallowance of the deduction is therefore sustained. It does not appear that any contract was made between Kelly and the decedent or that Kelly's employment was in consideration of the decedent's promise. There was merely a beneficient promise by the decedent to make additional donations to the university which the university undertook to use in the prescribed way. However binding the decedent's promise, it cannot, upon this record, be said to have been based on an adequate and full consideration in money or money's worth.

XII

Findings of Fact.—The decedent had for several years been contributing $1,900 to the University of Cincinnati,

which was used by the university to augment the salary of Professor More. At the time of her death she had not paid [fol. 32] this amount for the year 1930-1931, and the petitioner, as her executor, regarding it as an obligation, paid it to the university.

Opinion.—Without more evidence than is in the record regarding this item, it can not be said that the amount was paid as a claim based upon an adequate and full consideration in money or money's worth, and the respondent's disallowance of the deduction is therefore sustained.

Reviewed by the Board.

Judgment will be entered under Rule 50.

(Seal.)

BEFORE UNITED STATES BOARD OF TAX APPEALS

JUDGMENT—Entered February 11, 1936

Subsequent to the Board's report, promulgated December 10, 1935, the respondent filed a proposed judgment which the petitioner agrees is in accordance with the said report. It is, therefore,

Ordered, Adjudged and Decided that there is a deficiency in estate tax of $558,298.91.

(Signed) John M. Sternhagen, Member. (Seal.)

[fol. 33] IN UNITED STATES CIRCUIT COURT OF APPEALS

PETITION FOR REVIEW AND ASSIGNMENT OF ERRORS—Filed May 8, 1936

To the Honorable Judges of the United States Circuit Court of Appeals for the Sixth Circuit:

Now Comes Robert A. Taft, Executor of the Estate of Anna S. Taft, and respectfully shows to this Honorable Court as follows:

I

Your petitioner on review (hereinafter referred to as the Executor) is a citizen of the United States, a resident of the

State of Ohio, with offices at No. 420 Dixie Terminal Building, Cincinnati, Ohio, and was designated in the will of Anna S. Taft, the decedent, and was duly appointed by the Probate Court of Hamilton County, Ohio, as the Executor of the Estate of Anna S. Taft, who, prior to her death in 1931, was a citizen of the United States and a resident of Cincinnati, Ohio. Anna S. Taft (hereinafter sometimes referred to as the decedent) died on January 31, 1931. The Executor filed a Federal estate tax return on February 1, 1932, with the Collector of Internal Revenue for the First District of Ohio, whose office is located in Cincinnati, Ohio, and within the judicial circuit of the United States Circuit Court of Appeals for the Sixth Circuit.

Your respondent, on review, (hereinafter referred to as the Commissioner) is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States appointed and holding his office under and by virtue of the laws of the United States.

II

Pursuant to the provisions of the Revenue Act of 1926, the Commissioner determined a deficiency of $1,627,585.28 in the Federal estate tax of the decedent, and on September 22, 1934, in accordance with the provisions of Section 303 (a) of the said Act, as amended by Section 501 of the Revenue Act of 1934, sent by registered mail a notice of the said deficiency to the Executor. Thereafter, on October 23, 1934, said Executor filed with the Commissioner a waiver of the restrictions provided in Section 308 (a) of the Revenue Act of 1926 on and consented to the assessment and collection of [fol. 34] $273,662.20 of said deficiency (being the net amount of said deficiency after allowing the full 80% credit for Ohio Inheritance Taxes), together with any interest properly applicable thereto. This waiver further provided that the Executor did not thereby waive any right to petition the Board of Tax Appeals for a redetermination of the entire deficiency, and that he should be entitled to the refund of any portion of said $273,662.20, together with any interest properly applicable thereto, as provided by law, which should be an over-payment of the tax as determined by the Board of Tax Appeals. Thereafter the assessment was made and on November 26, 1934, the Executor paid said portion of deficiency in the sum of $273,662.20, together with interest in the sum of $45,795.30. On November 23, 1934, the

Executor filed a petition with the United States Board of Tax Appeals seeking a redetermination of said deficiency. On February 25, 1935, the Executor filed an amended petition. The amended petition came on for hearing before said Board of Tax Appeals on February 25, 1935, which date is subsequent to the date of the enactment of the Revenue Act of 1926. The United States Board of Tax Appeals promulgated its opinion in that appeal on September 10, 1935, and entered its judgment and order therein on February 11, 1936, wherein and whereby the said Board ordered, adjudged and decided that there is a deficiency of $558,298.91 in the Federal estate tax of the decedent.

III

Statement of the Nature of the Controversy

There are five issues involved in this petition for review, all arising from the disallowance by the Commissioner of deductions claimed by the Executor under the provisions of Section 303 of the Revenue Act of 1926, the disallowance being in each instance sustained by the Board of Tax Appeals.

The first issue on review arises from the Commissioner's disallowance of a deduction of $2,000,000. On May 3, 1930, the decedent offered to establish a fund for the University of Cincinnati to be known as the Charles Phelps Taft Memorial Fund in memory of her husband. This offer provided that she would make available for the University the sum of $50,000 during the ensuing year, $75,000 during the [fol. 35] following year, and in each year thereafter the sum of $100,000, or such other income as might be derived from a fund of $2,000,000, which she agreed to ultimately transfer to certain trustees. She further agreed that pending the complete transfer of the principal of the fund, she would guarantee all obligations within the limits of the income above set forth. The offer of this fund was accepted by the University on May 6, 1930. The decedent paid to the trustees named in her offer on or about October 1, 1930, the sum of $50,000 in cash, and the trustees organized on that date. Of this sum of $50,000, $33,800 was appropriated in December, 1930, by the trustees to specific uses by the University, and $11,750.83 was actually spent by the University prior to the decedent's death. Since that time, the Executor has paid to the trustees amounts from time to time calcu-

lated as interest at the prevailing rates upon the $2,000,000. The University of Cincinnati is a charitable corporation organized for educational purposes and operated by the City of Cincinnati. The Board sustained the disallowance of this deduction of $2,000,000.

The second issue on review arises from a deduction of $3,900 made by the Executor. The Cincinnati Institute of Fine Arts which operated the Cincinnati Symphony Orchestra at the beginning of its 1929-1930 season, determined that the number of men employed by the Orchestra would have to be reduced in order to balance its budget. At the request of the Director of the Orchestra that two additional men be kept on over and above the budgeted number, the decedent notified the Orchestra that if it would employ such additional players at a salary of $3,920, she would pay that salary. The Institute accepted this offer and employed the additional players and the decedent paid their salary of $3,920. This offer was renewed for the season 1930-31, and the additional men were again kept on. The Executor paid this $3,920 after the decedent's death. The Board sustained the Commissioner's disallowance of the deduction of the $3,920 paid by the Executor. The Cincinnati Institute of Fine Arts is a charitable corporation not for profit organized under the laws of Ohio exclusively for charitable and educational purposes and for the encouragement of art, which controls the Cincinnati Symphony Orchestra, also a charitable corporation.

The third issue on review arises from the disallowance by the Commissioner of a deduction of $10,000 taken by the [fol. 36] Executor on the return. On May 21, 1927, the decedent and her husband, Charles Phelps Taft, deeded to the said Cincinnati Institute of Fine Arts, their collection of oil paintings and other pictures, and their residence property, and agreed to pay to the Institute the sum of $1,000,000 before October 1, 1927, as an endowment for the Cincinnati Symphony Orchestra on condition that there be contributed by others to the Institute as a permanent endowment, the additional sum of $2,500,000, and on condition that the Institute take over and operate the Cincinnati Symphony Orchestra. Under the deed the decedent and her husband were to retain the use of the residence and the pictures during their lives. The Cincinnati Institute of Fine Arts complied with the conditions of the deed of

gift prior to January 1, 1929, and the decedent paid to the Institute the said sum of $1,000,000. On June 3, 1929, by a letter, decedent notified the Institute that she had arranged to make a bequest of $1,000,000 to the Institute, the income from which was to be devoted to the maintenance of her house and picture collections and the payment of the salary of a curator and other employees, and that in the meantime, she desired to have the Institute and the Cincinnati Art Museum Association, also a corporation not for profit, organized under the laws of the State of Ohio exclusively for charitable and educational purposes and for the encouragement of art, make a united effort to secure the recognition of Cincinnati as an artistic center, and stated that she believed that it could best be accomplished by the appointment of a man of recognized ability in art as a director of the Art Museum and the director of art of the Institute, and that she would contribute $10,000 per annum toward the salary of such a man. Thereupon the Institute and the Art Museum, relying on this offer, engaged Walter A. Siple of the Fogg Art Museum of Harvard University, at a salary of $10,000 per year. Prior to her death, the decedent paid to the Institute $10,000 in payment of Mr. Siple's salary for the year 1929-1930, and $5,000 in payment of one-half of Mr. Siple's salary for the year 1930-1931. Since the decedent's death, the Executor paid $5,000 as the last one-half of the salary for the year 1930-1931, and $5,000 for one-half the year 1931-32, that is, up to February 1, 1932, at which time the $1,000,000 bequest contained in the codicil of the decedent's will became available to pay the salary. The Board sustained the Commis- [fol. 37] sioner's disallowance of this deduction of $15,000.

The fourth issue on review arises from the disallowance by the Commissioner of a deduction of $1500 claimed by the Executor. In 1930, the decedent promised to the University of Cincinnati that if the University would employ Professor Kelly to give a course in music appreciation, a course which the University was not otherwise financially able to give, she would pay to the University $3,000, the amount of his salary. Relying on this offer, Professor Kelly was employed and the decedent made five periodical payments of $3,000 each to the University during her lifetime. The Executor paid $1500 on this account after her death. The Board of Tax Appeals sustained the Commissioner's disallowance of this deduction.

The fifth issue on review arises from the disallowance by the Commissioner of a deduction of $1,900 claimed by the Executor. In 1922 the decedent offered to the University of Cincinnati that if it would increase the salary of Louis T. More, professor of physics and dean of the graduate school, by the sum of $1,900, she would pay to the University the amount of this increased salary. The University paid to Mr. More this increased salary each year thereafter and the decedent paid this amount to the University each year. At the time of the decedent's death, she had not paid to the University the sum of $1,900 for Mr. More's salary for the year 1930-1931. The Executor paid this amount to the University after her death. The Board of Tax Appeals sustained the Commissioner's disallowance of this deduction.

IV

Designation of the Court of Review

A review of the decision of the United States Board of Tax Appeals in the above entitled cause is sought by the United States Circuit Court of Appeals for the Sixth Circuit.

V

Assignment of Errors

The Executor says that in the record and proceedings before the United States Board of Tax Appeals and in the decision and final order of redetermination rendered and entered by the said Board of Tax Appeals, manifest [fol. 38] error occurred and intervened to the prejudice of the Executor, and being aggrieved by the said findings of the United States Board of Tax Appeals, its order, judgment and decision, the Executor hereby assigns the following errors, which he avers occurred in the said record, proceedings, decision, judgment and final order of redetermination, and upon which he relies to reverse the said decision, judgment and final order, to-wit:

1. In failing to find and hold that the decedent's promise to pay $2,000,000 to the University of Cincinnati was a claim against the Estate for an adequate and full consideration in money and money's worth, within the meaning of Section 303 (a) (1) of the Revenue Act of 1926;

2. In failing to find and hold that there was a transfer of said $2,000,000 to the trustees for the use of a charitable corporation, within the meaning of Section 303 (a) (3) of the Revenue Act of 1926;

3. In failing to find and hold that decedent's promise to contribute to the Cincinnati Institute of Fine Arts the $3,920 for two additional musicians was made for an adequate and full consideration in money or money's worth, within the meaning of Section 303 (a) (1) of the Revenue Act of 1926;

4. In failing to find and hold that the decedent's promise to the Cincinnati Institute of Fine Arts to pay $10,000 towards the salary of a man to be employed by the Institute as a director of art, was made for an adequate and full consideration in money or money's worth, within the meaning of Section 303 (a) (1) of the Revenue Act of 1926;

5. In failing to find and hold that decedent's promise to the University of Cincinnati to pay $1500 per year for the salary of Professor Kelly, was made for an adequate and full consideration in money or money's worth, within the meaning of Section 303 (a) (1) of the Revenue Act of 1926;

6. In finding and holding that as a matter of evidence the employment of Professor Kelly by the University of Cincinnati was not in consideration of the decedent's promise, and in failing to find that the employment of Professor Kelly was in consideration of the decedent's promise;

[fol. 39] 7. In failing to find and hold that decedent's promise to pay $1,900 per year to the University of Cincinnati to augment the salary of Professor More, was made for an adequate and full consideration in money or money's worth, within the meaning of Section 303 (a) (1) of the Revenue Act of 1926;

8. In failing to find as a matter of evidence that the University of Cincinnati made a contract with Professor More to increase his salary by $1,900 per year in consideration of the decedent's promise to pay $1,900 to the University, and in failing to find that Professor More's employment at the additional salary was in consideration of the decedent's promise.

9. In failing to find as a matter of law that a consideration merely sufficient to support a contract and to bind the decedent to her promise constitutes an adequate and full consideration in money or money's worth as contemplated by Section 303 (a) (1) of the Revenue Act of 1926.

10. In failing to hold as a matter of law that a promise to pay money to a charitable corporation, which is legally binding under the laws of the state where made, is a claim against the estate which is deductible from the gross estate in determining the Federal estate tax under the provisions of Section 303 (a) (1) of the Revenue Act of 1926;

11. In failing to hold as a matter of law that a promise to pay a sum of money to a charitable corporation in reliance upon which promise the charitable corporation incurs an obligation to pay a money consideration to a third party, and which promise is legally binding under the laws of the state in which it was made, is a claim against an estate which may be deducted from the gross estate in determining the Federal estate tax in accordance with the provisions of Section 303 (a) (1) of the Revenue Act of 1926.

Wherefore, your petitioner prays that this Honorable Court may review such findings, decisions, opinion and order, and reverse and set aside the same, and that the Clerk of the United States Board of Tax Appeals be directed to transmit and deliver to the Clerk of this Court a transcript of the record for filing, and that appropriate action be taken to the end that the errors complained of [fol. 40] may be reviewed and corrected by said Court.

Robert A. Taft, Executor of the Estate of Anna S. Taft, Deceased. Taft, Stettinius & Hollister, Robert A. Taft, Charles P. Taft, John H. More, Attorneys for Petitioner, 420 Dixie Terminal Building.

Duly sworn to by Robert A. Taft. Jurat omitted in printing.

[fol. 41] In United States Circuit Court of Appeals

Notice of Filing Petition for Review—Filed May 8, 1936

To Herman Oliphant, Esq., General Counsel, for the Department of the Treasury, Washington, D. C., Attorney for Respondent:

Please take notice that on the 8th day of May, 1936, the undersigned will present to this Board and file with the Clerk thereof, the petition of Robert A. Taft, Executor of the Estate of Anna S. Taft, deceased, a copy of which is annexed hereto, for the review by the United States Circuit Court of Appeals for the Sixth Circuit of the final order and decision of the Board in the above entitled proceeding, entered upon the records of said Board on the 11th day of February, 1936.

Dated this 7th day of May, 1936.

John H. More, Charles P. Taft, Taft, Stettinius & Hollister, Attorneys for Robert A. Taft, Executor of the Estate of Anna S. Taft, Deceased.

A copy of the within notice and copy of petition for review is hereby accepted this 8th day of May, 1936.

(S.) Herman Oliphant, General Counsel for the Department of the Treasury.

[fol. 42] Before United States Board of Tax Appeals

Statement of Evidence—Filed October 5, 1936

The following is a statement of evidence in narrative form in respect of the issues involved in the Petition for Review in the above entitled cause. This proceeding came on for hearing before the Honorable John M. Sternhagen, member of the United States Board of Tax Appeals, on the 25th day of February, 1935. Robert A. Taft, Esq., Charles P. Taft, II, Esq., and John H. More, Esq., appeared for the Petitioner on Review, and E. C. Algire, Esq. and Lloyd B. Harrison, Esq., appeared for the Respondent on Review.

The hearing came before the United States Board of Tax Appeals on amended pleadings. After statements of the

case were made by counsel for both parties, the testimony was submitted in part by written stipulation of facts, and in part by our oral testimony.

The following facts were submitted in respect of the issues to be prosecuted in this Petition for Review by a written stipulation.

STIPULATION OF FACTS

I

1. The Petitioner, Robert A. Taft, is a citizen of the United States, and is the duly appointed, qualified and acting Executor of the Estate of Anna S. Taft, deceased, appointed by the Probate Court of Hamilton County, Ohio.

II

2. Anna S. Taft died on January 31, 1931, and at the time of her death was a citizen and resident of the State of Ohio. Said decedent left a last will and testament and codicil, which was duly admitted to probate by the Probate Court of Hamilton County, Ohio, on February 13, 1931,

* * *

III

3. On February 1, 1932, Petitioner filed a federal estate tax return for the Estate of Anna S. Taft, deceased, showing the Estate tax liability as follows:

Total gross estate	$9,257,101.80
Total deductions	5,560,233.90
Net estate for tax	3,696,867.90
Total estate tax	324,092.83
Credit for inheritance tax Ohio	259,274.26
Amount of estate tax payable after subtracting credits	$ 64,818.57

* * * * * * *

[fol. 43] 5. Under Schedule I—Debts of Decedent, there were included the following items:

Item No.	Creditor and Nature of Claim	Amount
•	• • • • • •	•
71	Cincinnati Institute of Fine Arts—Agreement to pay $10,000 per year toward salary of Walter H. Siple, Director of Art for the Institute	$5,000.00
72	Cincinnati Institute of Fine Arts—Agreement to pay $50,000 per year for three years toward support of Cincinnati Symphony Orchestra	128,920.00*
•	• • • • • •	•
76	University of Cincinnati—	
	1. Obligation to pay salary of Thomas J. Kelly	1,200.00
	3. Pledge dated May 30, 1930	2,000,000.00
•	• • • • • •	•

* (This Stipulation by error omits the fact that an agreement to pay $3,920.00 for salaries is included in the total of $128,920.00. The Petitioner on Review is appealing only as to this sum of $3,920.00.)

IV

6. Upon final audit and determination by the Commissioner of Internal Revenue, Respondent herein, of said estate tax liability, the gross estate was increased to $14,868,476.61, and deductions were allowed in the amount of $3,173,957.34, resulting in a net estate of $11,694,519.27, and a net tax (giving no credit for additional Ohio inheritance tax) in the sum of $1,692,403.85, or a deficiency of $1,627,585.28.

7. In said final audit and determination the Respondent • • • excluded from the Debts of decedent all of the said items listed above in Paragraph 5.

• • • • • • •

VII

* * * * * * *

17. The Cincinnati Museum Association is a corporation organized under the laws of the State of Ohio, and a copy of its articles of incorporation is attached hereto and made a part hereof, marked "Exhibit H."

* * * * * * *

[fol. 44] VIII

19. The Cincinnati Institute of Fine Arts is a corporation organized under the laws of the State of Ohio. The articles of incorporation of the Cincinnati Institute of Fine Arts, the constitution of the Cincinnati Institute of Fine Arts, a letter addressed to it by Mr. and Mrs. Charles P. Taft, transmitting deed of gift dated May 21, 1927, and a deed of gift from Mr. and Mrs. Charles P. Taft, dated May 21, 1927, are as set out in a pamphlet attached hereto, marked "Exhibit I."

* * * * * * *

IX

22. On June 3, 1929, Mrs. Taft addressed the following letter to William Cooper Procter, President of the Cincinnati Institute of Fine Arts:

"Cincinnati, Ohio, June 3, 1929.

Mr. William Cooper Procter, President, Board of Trustees,
The Cincinnati Institute of Fine Arts, Cincinnati, Ohio.

DEAR SIR:

The completion of the endowment fund of The Cincinnati Institute of Fine Arts has secured the permanence of that institution as a vital force in the development of Art and Music in the City of Cincinnati. I realize, however, that for many years the greater part of the income from the existing endowment fund will be required for the support of the Cincinnati Symphony Orchestra, and I have been somewhat concerned regarding a proper provision for the maintenance of the Taft Collection.

I have, therefore, arranged for a bequest in the sum of $1,000,000, the income to be devoted to the maintenance and

care of the Collection and the building in which it is housed, and to the payment of the salary of a curator and other employees. It will be provided that not to exceed $500,000 of the principal may be used in the fireproofing or reconstruction of the existing house if the reconstructed house is substantially the same, in plan, character and appearance as the existing house. This fund will afford an income which [fol. 45] can never be used for any other purpose, and will assure proper care and upkeep of the Collection for the benefit of the people of Cincinnati in time to come.

In the meantime I am much interested in the making of a united effort by the Institute and the Cincinnati Art Museum to secure for Cincinnati the recognition to which it is entitled as a center of artistic culture. I believe that this can be best accomplished by employing a man of recognized ability in the art field to be Director of Art for the Institute, and *I should be glad to contribute the sum of $10,000.00 per annum toward the salary of such a man.*

Sincerely yours, (Signed) Anna Sinton Taft."

* * * * * * *

XII

27. The University of Cincinnati is a university organized under the laws of the State of Ohio, General Code Sections 7902 to 7920, inclusive, as a muncipal university owned by the City of Cincinnati, a municipal corporation under the laws of said state. It is governed by a Board of Directors appointed by the Mayor of the City of Cincinnati, and has no separate corporate existence from that of the City of Cincinnati. Its work is purely educational, and no profit inures to any individual.

XIII

28. On May 3, 1930, the decedent addressed to the Board of Directors of the University of Cincinnati the following letter:

"Cincinnati, Ohio, May 3, 1930.

To the Board of Directors of the University of Cincinnati, Cincinnati, Ohio.

GENTLEMEN:

I desire to establish a fund, to be known as the Charles Phelps Taft Memorial Fund, to be used to assist, maintain

and endow the study and teaching of "The Humanities" in [fol. 46] the College of Liberal Arts and the Graduate School of the University of Cincinnati. For the present I desire to have this fund administered by a Board of Trustees, consisting of Louise Taft Semple, William T. Semple, Robert A. Taft, Herbert G. French and myself, and I will make available for them during the ensuing year the sum of Fifty Thousand Dollars ($50,000), during the following year the sum of Seventy-five Thousand Dollars ($75,000), and in each year thereafter the sum of One Hundred Thousand Dollars ($100,000), or such other income as may be derived from a fund of Two Million Dollars ($2,000,000) which I will ultimately arrange to transfer to such Trustees. Pending the complete transfer of the principal of this fund I will guarantee all obligations which the Trustees may assume within the limits of the income above set out. The Trustees shall have a wide discretion in defining the term "The Humanities" and the purposes for which the income shall be used, but no expenditure shall be made by the Board of Trustees except in accordance with plans prepared within the College of Liberal Arts and the Graduate School and approved by the Board of Directors of the University.

I establish this fund as a memorial to my husband, Charles Phelps Taft, whose interest in the advance of culture and art included an especial interest in the progress of the University of Cincinnati, and a real enthusiasm for those studies which relate rather to the improvement of the mind than to physical and material betterment.

It is my belief that the University of Cincinnati is one of our most powerful agencies for strengthening the intellectual and spiritual values already so highly developed in Cincinnati. I realize that this particular gift is confined to one aspect of that development, but the activities of the University are so varied that it is impossible for any one person to cover the entire field, or even to cover completely one phase of the subject. My particular interest is in bringing about a concentration of interest upon that group of ideas which is generally known as "The Humanities," hoping that others may be inspired to join in the same work or other work of the University. In referring to "The Hu- [fol. 47] manities," I include particularly literature and language, philosophy, and history, and with these I have also in mind economics and mathematics. Without wishing to lessen, or to regard in any way lightly, the great efforts

being put forth for the material and physical betterment of mankind, to which great funds are everywhere being devoted, I believe that there is some danger of a lack of emphasis on the value of thought and conduct and character, and I have therefore confined my gift to "The Humanities," which are concerned particularly with the development of ideas, of thought and of character.

I should be obliged if you would let me know if the establishment of the Charles Phelps Taft Memorial Fund is acceptable to your Board.

Sincerely yours, (Signed) Annie Sinton Taft."

29. The Trustees of the Charles Phelps Taft Memorial Fund referred to in said letter dated May 3, 1930, met on October 1, 1930, and on December 10, 1930. A record of the proceedings of the Trustees at these meetings is attached hereto, marked "Exhibit O."

30. On January 6, 1931, the Board of Directors of the University met, and action was taken regarding the Charles Phelps Taft Memorial Fund appropriations as set out in certified copy of minutes attached hereto and made a part hereof, marked "Exhibit P."

* * * * * * *

The following is a statement in narrative form of the evidence introduced by oral testimony.

Robert A. Taft, was called as a witness on behalf of the Petitioner on Review, and after being duly sworn, testified as follows:

Direct testimony:

I became the attorney for Mrs. Anna Sinton Taft in the year 1921 and served in that capacity continuously until her death.

[fol. 48] Here counsel for Petitioner on Review read Paragraph 19 of the Stipulation of Facts. The witness then continued his testimony as follows:

Mr. and Mrs. Taft conferred with a number of citizens in Cincinnati regarding their wish to give their house and the collection of pictures and other works of art to the City on the condition that the citizens raise two one-half million dol-

lars largely to be used for the support of the Cincinnati Symphony Orchestra in which they were also interested.

Mrs. Taft had contributed as much as $200,000 to the Symphony Orchestra herself, and wished to get more general support of the Orchestra instead of having it entirely on her own shoulders. She also wished to give her collection to the City.

The campaign was undertaken and succeeded in raising more than two one-half million dollars.

The Cincinnati Institute of Fine Arts took over the Cincinnati Symphony Orchestra for the orchestra year 1929-1930. I am not certain just what date they took it over, but Mrs. Taft operated it, so to speak, during the year 1928-1929. The budget for the year 1929-1930 was prepared in February or March, 1929. The Fine Arts, in taking over the Orchestra, had to make certain cuts even with the endowment that had been raised, in view of the fact that Mrs. Taft had contributed a still larger amount than the income from this endowment. Mr. Reiner, the leader of the Orchestra, objected to some of those cuts and went to Mrs. Taft, and she finally authorized me to say that she would pay $3,920.00 more for the two years that the contracts were being made for, if the Orchestra took on, I do not know whether it was one or two more men, than were called for by the Fine Arts budget. The $3,920.00 payments were for each year. This offer was made to Mr. French who was the head of the Symphony Committee of the Institute of Fine Arts. My position on the Board of the Cincinnati Symphony Orchestra was vice-chairman. In accordance with that pledge, Mrs. Taft paid $3,920.00 on March 27, 1930. On March 23, 1931, I paid the second year, $3,920.00, to the Cincinnati Symphony Orchestra.

[fol. 49] Counsel for the Petitioner on Review here read Paragraph 22 of the Stipulation of Facts. The witness then continued his testimony as follows:

I am familiar with all the circumstances surrounding that gift. I drafted the letter for Mrs. Taft at her request. Mr. Siple was the Assistant Director of the Fogg Museum in Cambridge, Massachusetts, and was engaged by the Institute of Fine Arts and the Art Museum after this letter of June 3, 1929, (a part of Paragraph 22 of the Stipulation) was written to the Fine Arts by Mrs. Taft. In accordance

with that letter Mrs. Taft paid Mr. Siple's salary of $10,000 per year as follows: $10,000 on January 22, 1930, and on January 19, 1931, $5,000 for the first half of Mr. Siple's salary for the year 1931-1932. On December 21, 1931, I paid $5,000 and on March 22, 1932, I paid $5,000, or a total of $10,000. I reached the conclusion that we were obligated to pay that $10,000 in this way. Mrs. Taft was obviously obligated to pay Mr. Siple's salary for the year 1930-31, as she died on January 31, 1931, and Mr. Siple had been engaged already. The bequest of $1,000,000 for the Taft Collection was not payable under the Ohio law until a year after Mrs. Taft's death—January 31, 1932, and I therefore paid out of the Estate the first half of Mr. Siple's salary for the year 1931-1932, which was the fiscal year of the Art Museum. Mr. Siple came to the Art Museum in October, 1929. The $1,000,000 bequest had not as yet been paid, but from February 1, 1932, I paid the Institute of Fine Arts interest on the $1,000,000.

Counsel for the Petitioner on Review here read Paragraphs 27, 28, 29 and 30 of the Stipulation of Facts. The witness then continued his testimony as follows:

Very wide publicity was given this offer and its acceptance (referring to the letter of May 3, 1930, and its acceptance, as set forth in Paragraph 28 and exhibit "O" to Paragraph 29 of the Stipulation) throughout the entire State. There were publications regarding the matter in the Cincinnati Times Star and in the Cincinnati Enquirer.

(Here counsel for Petitioner on Review offered in evidence clippings from the Cincinnati Times Star, Cincinnati [fol. 50] Enquirer, and an article from the Literary Digest, which were marked Petitioner's Exhibits 5, 6 and 7, for identification. Counsel for Respondent on Review objected to their admission and his objection was sustained, to which counsel for Petitioner on Review took an exception. Counsel for Respondent on Review also excepted to the said exhibits being marked for identification.)

The witness thereupon continued his testimony as follows:

Prior to Mrs. Taft's death, she paid on these pledges on September 30, 1930, $50,000 to the Trustees of the Taft Memorial Fund. I was one of those Trustees. The proceed-

ings before her death regarding that $50,000 are set out in the Stipulation. Since Mrs. Taft's death, I have made the following payments:

December 21, 1931	$30,000.00
July 6, 1932	15,000.00
June 21, 1932	5,000.00
July 6, 1932	10,000.00
October 8, 1932	20,000.00
February 17, 1933	25,000.00
March 16, 1933	10,000.00
April 27, 1933	20,000.00
November 1, 1933	17,500.00
April 3, 1934	17,500.00
May 5, 1934	17,500.00
June 27, 1934	17,500.00
November 26, 1934	34,875.00
January 31, 1935	14,875.00

These payments are intended, roughly, as interest on the sum of $2,000,000, reserving margins for various contingencies. There has been some question with the University as to how it should be calculated. For some time, I paid roughly at the rate of 5%, but at the present time, I am paying at the rate of 3½%. I have made no payments on account of principal. The Estate has been filing income tax returns for each year since the death of the decedent. On those income tax returns the Estate has taken deductions for these last amounts which are interest. The government has not committed itself as to whether it will allow us to take this interest, but we have claimed that right.

[fol. 51] I knew all about Mrs. Taft's agreement in regard to Mr. Kelly. Mr. Kelly was connected with the Conservatory of Music, and Mrs. Taft had an agreement with the University of Cincinnati that if they would engage Mr. Kelly, as joint professor or assistant professor to give a course in musical appreciation, she would pay a salary of $3,000 for the year 1930-1931. I understood that she had made this arrangement for the years before, but I do not know about that. I know that she made it for that year at the end of or about the end of the calendar year of 1930. Prior to her death, she had paid $300.00 every month—for the months of May and June $300.00, October 27, $300.00, November 29, $300.00, December 17,

$300.00, January 22, 1931, $300.00. I paid $1500.00 in installments of $300.00 each on February 20, March 31, April 21, May 29, and June 15, 1931.

Cross-examination:

The payment by Mrs. Taft of $50,000 in connection with the $2,000,000 pledged for the Taft Memorial was also interest. It did not cover any of the principal. In her letter she says that she would provide $50,000 for the first year, $75,000 the second year, and thereafter $100,000 until she paid the sum of $2,000,000. This was the $50,000 referred to in that letter. It did not apply on the $2,000,000.

Recross-examination:

Throughout my testimony when I have been testifying in the first person singular, as to matters and amounts I have paid, I have in every instance been referring to myself as the Executor of the Estate. I have made no payments from my own funds.

At this point the witness was excused, and

HERBERT G. FRENCH, was called as a witness on behalf of the Petitioner on Review, and after being first duly sworn, testified as follows:

[fol. 52] Direct examination:

My name is Herbert G. French, and I live in Hamilton County, Ohio. I am vice-president of The Procter & Gamble Company, president of the Cincinnati Institute of Fine Arts. I am chairman of the Board of the Cincinnati Symphony Orchestra.

The Cincinnati Institute of Fine Arts took in charge the budget of the Cincinnati Symphony Orchestra on the first day of January, 1929. I discussed with Mr. Reiner the budget, probably very shortly after January, 1929. Mr. Reiner was the Conductor of the Symphony. It was necessary to make some economies and we undertook to reduce his budget $25,000. This necessitated cutting off some men to whose services he attached great importance. He was unwilling to let them go and he argued with us and went to Mrs. Taft and finally got her consent to retain the two

men, for which Mrs. Taft paid the additional amount. This amount for the year 1929 and 1930 was $3,920.00. The Symphony Orchestra would not have employed these additional musicians unless she had agreed to pay for them. They were continued for the succeeding year 1930-1931, in the same amount, and the Symphony Orchestra would not have continued these men except on Mrs. Taft's pledge. Payments of $3,920.00 were made on that pledge for the year 1930-1931. The first payment was made in March, 1930, and the second payment in March, 1931, $3,920.00 in both cases. We had an unusually large Orchestra. The Conductor was very ambitious, and it was a hard thing for him to accept our judgment that it must be cut in numbers. The two men whom he valued so very much were of his own selection as needed for artistic excellence of the Orchestra. I do not know who they were, but I could have identified them, and can do so now, when I look up our records. It was not merely a matter of cutting the violin section, for example, of any two men, but there were two special men they wanted to keep. Mrs. Taft knew that there were two identified men and that it was Mr. Reiner's great wish to have these two specific individuals retained. I do not imagine that they knew that their pay was coming to them from or by reason of the contribution [fol. 53] of Mrs. Taft. They had not been advised that they were going to be let go. I think we advised Mr. Reiner of our necessity of the cut and it was our thought that he would make the selection of those who must go. Before the thing reached the point of notifying these individuals, he had appealed his case and got this relief. The members of the Orchestra knew nothing about it. They simply knew what men had been let go and those who were left were unaware of the means by which they were being kept.

The appointment of Mr. Siple was first discussed in the summer or spring of 1929. The connection between the Institute of Fine Arts and the Art Museum in the summer of 1929 was that the Institute of Fine Arts, involving the Museum represented by the Taft Home and Collection, made Mrs. Taft eager to have a director of the Taft Museum, and her thought that she gave consideration to was to have one man here who would be director of the Art Museum and a director of the Taft Museum and would hold a place in the community of consequence, holding both of

these offices. The Institute of Fine Arts did not have sufficient funds to employ a man for a salary of $10,000 a year except with Mrs. Taft's pledge. It would not have done so except for that pledge.

I am a member of the Board of Directors of the University of Cincinnati. I do not remember exactly how long I have occupied that position—about fifteen years, I should say.

I recall Thomas James Kelly's appointment as the Lecturer of Music for the year 1930 by the Board of Trustees. I asked the Clerk to refresh my memory by giving me a copy of the Board's action, which was taken on June 3, 1930. The University had sufficient assets to pay his salary, but they would never have paid it. It was not so vital, of course, as would warrant the payment of that money. The course of musical appreciation would not have precedence over other courses for the use of our limited funds. We would not have paid it if it had not been furnished from some other source, and the University would not have employed him except for that provision.

I know of the resolution accepting the offer of the Taft [fol. 54] Memorial Fund. I do not have a copy of the resolution, but the offer was accepted, to my knowledge, at a Board meeting at which I was present. Prior to January 31, 1931, the books of the University of Cincinnati show expenditures amounting to $11,753.83 from the appropriation covered by Exhibit P of the Stipulation before Mrs. Taft's death.

Cross-examination:

The Cincinnati Orchestra is under the Institute of Fine Arts. I am the head of the Symphony Board which is really, you might say, a committee of the Institute Board. It is managed by a Board of which I am the chairman. We considered it very desirable indeed that the Orchestra retain these two men whose salary was contributed by Mrs. Taft, but not within our ability to retain them.

Mr. Kelly is a scholar, an exceptional scholar, and his course of music appreciation was a desirable adjunct to any institution, but it was not one which we would have felt justified in adding to the University at that time, with finances as they were. I did not solicit Mrs. Taft for this

man's salary. I do not know of any one that did. I should say, I do not think any of my associates solicited Mrs. Taft for this man's salary. The probability is that Mr. Kelly suggested it to her.

Redirect examination:

The resolution says that Mr. Kelly be appointed Lecturer on Musical Appreciation, effective September, 1930.

The witness was then excused and both parties rested.

Approval of Statement of Evidence by Counsel

The foregoing and the exhibits attached hereto and made a part of this Statement of Evidence, together with Exhibit I of the Stipulation of Facts which has been certified to the Court in its original form in the Petition for Review of Guy T. Helvering, Commissioner of Internal Revenue, v. Robert A. Taft, Executor of the Estate of Anna Sinton Taft, deceased, of other portions of the decision of the [fol. 55] United States Board of Tax Appeals not under review in this Petition, and which exhibit the parties hereto ask to be incorporated in this Statement of Evidence by reference as though it were physically incorporated herein with leave to the parties hereto to refer to it upon brief or in oral argument with the same force and effect as though a copy thereof were physically incorporated in the Statement of Evidence and printed in the record hereof, constitute all of the material evidence adduced at the hearing before the United States Board of Tax Appeals in respect of the issues covered by the Petition for Review in the above stated cause, and the same is hereby approved by the parties hereto by their respective counsel.

John H. More, Counsel for Robert A. Taft, Executor of the Estate of Anna Sinton Taft, deceased, Petitioner on Review. Herman Oliphant, Counsel for Respondent on Review.

ORDER APPROVING STATEMENT OF EVIDENCE

The foregoing Statement of Evidence is hereby approved this 5th day of October, 1936.

(S.) J. M. Sternhagen, Member, United States Board of Tax Appeals.

EXHIBIT H

Articles of Incorporation of the Cincinnati Museum Association

We the undersigned, Charles W. West, Joseph Longworth, David Sinton, Reuben R. Springer, and Julius Dexter, citizens of Ohio, hereby associate ourselves together and become a body corporate, under the laws of Ohio, for the purpose of establishing and maintaining in Cincinnati a Museum, wherein may be gathered, preserved, and exhibited valuable and interesting objects of every kind and nature, and for the further purpose of using the contents [fol. 56] of said museum for education through the establishment of classes and otherwise, as may be found expedient.

I. The name of said association shall be "Cincinnati Museum Association."

II. The property of said association shall be in Hamilton county.

III. The capital stock of said association shall be Three Thousand Seven Hundred Dollars, divided into One Hundred and Forty-eight Shares, of Twenty-five Dollars each; and no dividend shall ever be made or accrue to any holder of stock in said association. No associate or his successor shall ever own or have an interest in more than one share of stock of said association, and in case, during his lifetime, he wishes to sell said share, he shall first offer it at par to the association, and may only sell it otherwise after refusal of the association to buy it at par, and then only by a person approved by the trustees of the association; and in case of the death of any holder of stock, his share shall revert to and become the property of the association. The association shall at all times keep placed in the ownership

of proper persons the full number of one hundred and forty-eight shares, and to that end shall, within thirty days after becoming in any way the owner of a share of stock, sell or dispose of it to such person as the trustees may select.

IV. The trustees shall be ten in number, to be elected by the stockholders, and to hold their offices, two for one year, two for two years, two for three years, two for four years, and two for five years, from the first Monday in March, 1881, or until their successors are elected; and said shareholders shall annually thereafter, on the first Monday of March in each year, elect two trustees for the term of five years, or until their successors are elected.

Vacancies occurring in the board shall be filled by the trustees until the next annual meeting of the stockholders, and then shall be filled by them for the unexpired term. No trustee shall ever receive any compensation for his services.

V. These trustees shall have, on the part of the association, control over the disposition and management of the subscriptions now made to the museum, and of the subscriptions, loans, and gifts hereafter made to it, and of the [fol. 57] museum itself, with all its property and appendages.

The museum building shall be free to the public, except from such charges as may be necessary for providing the means to keep said building and its grounds in proper condition and repair, and to pay the expense of insurance, care, management, and attendance.

No stockholder, subscriber, trustee, director, or member shall ever receive any compensation, gain or profit from the association for the use of the museum building.

VI. The trustees shall annually report in print to the shareholders a full, accurate, and detailed account of their trust during the preceding year, showing the amount of their receipts and the sources, and the amount of their expenses and the direction, together with a statement of their actions during the year, and a statement of the condition, needs and prospects of the museum generally.

Any twenty-five resident freeholders in Cincinnati may require an investigation of the museum management and affairs, through one or more experts, to whom all books, papers, and accounts shall be opened.

Witness our signatures hereunto subscribed at Cincinnati, this 15th day of February, 1881.

Jos. Longworth, R. R. Springer, David Sinton, Charles W. West, Julius Dexter.

THE STATE OF OHIO,
Hamilton County, ss:

Before me, a notary public, within and for the county aforesaid, this day personally came Charles W. West, Joseph Longworth, David Sinton, Reuben R. Springer, and Julius Dexter, and severally acknowledged the foregoing articles of incorporation of the Cincinnati Museum Association to be their voluntary act and deed for the uses and purposes therein mentioned.

Witness my signature and seal of office at Cincinnati, this 15th day of February, 1881.

A. W. Goldsmith, Notary Public, Hamilton County, Ohio. (Seal.)

[fol. 58] STATE OF OHIO,
Hamilton County, ss:

I, Samuel W. Ramp, Clerk of the Court of Common Pleas within and for the said county of Hamilton, do hereby certify that A. W. Goldsmith, whose name is signed to the certificate hereto attached, was, at the time of subscribing the same, a legally acting notary public in and for said county of Hamilton, duly commissioned and qualified, and that I am well acquainted with his handwriting, and believe his said signature to be genuine, and that he is authorized to take the deposition of witnesses, acknowledgments of deeds, etc.

In witness whereof, I have hereunto set my hand and affixed the seal of the said court at Cincinnati, this 15th day of February, A. D. 1881.

Samuel W. Ramp, Clerk H. C. C. P. P., by W. M. Trevor, Deputy. (Seal.)

UNITED STATES OF AMERICA, OHIO,
Office of the Secretary of State:

I, Charles Townsend, Secretary of State of the State of Ohio, do hereby certify that the foregoing is a true copy of the certificate of incorporation of the "Cincinnati Museum Association," filed in this office on the 16th day of

February, A. D. 1881, and recorded in volume 21, page 19 of the records of incorporation.

In testimony whereof, I have hereunto subscribed my name and affixed my seal of office at Columbus, the 18th day of February, A. D. 1881.

Charles Townsend, Secretary of State. (Great Seal of the State of Ohio.)

[fol. 59] Filed Jan. 3rd, 1930.
Corp. No. 729.

The Cincinnati Museum Association

C. J. Livingood, President, and H. Gruesser, Secretary of The Cincinnati Museum Association, an Ohio Corporation organized not for profit, do hereby certify that at a meeting of the members of said corporation duly called and held on the 13th day of December, 1929, at 12:30 o'clock P. M., at which meeting a quorum of such members was present by the unanimous vote of the members present thereat, the following resolution of amendment was adopted:

Be It Resolved that Article IV of the Articles of Incorporation of this Association be, and it hereby is, amended so as to read as follows:

"IV. The members of the Board of Trustees shall be eighteen in number, of whom fourteen shall be elected by the stockholders, two of said fourteen for five years, two of same for six years, and two for seven years, or until their successors are duly elected and qualified, on the first Monday in March, 1930, and said stockholders shall annually thereafter on the first Monday in March in each year elect two trustees of said fourteen for the term of seven years, or until their successors are elected and qualified.

"Vacancies occurring in the board shall be filled by the trustees until the next annual meeting of the stockholders, and then shall be filled by them for the unexpired term. No trustee shall ever receive any compensation for his services.

"In addition to the fourteen trustees to be elected by the stockholders there shall be four trustees representing the City of Cincinnati, one of whom shall be the Mayor of the City of Cincinnati and three of whom shall be citizens of said city appointed by the Mayor, by and with the advice and consent of Council of said City, who shall serve for six years from date of appointment and until their successors are ap-

pointed, except that the first term of the additional trustee on behalf of the city shall be for the period expiring March, 1933, and except, also, that upon the expiration of the term of the present trustee on behalf of the city which expires March, 1930, his successor shall be appointed for a term of five years, so that the term of not more than one of said three trustees representing the City of Cincinnati shall ex-
[fol. 60] pire every two years; and said four trustees representing the City of Cincinnati shall have equal power and rights and be charged with all the duties appertaining to trustees elected by the stockholders of said Association."

In Witness Whereof, said C. J. Livingood, President, and H. Gruesser, Secretary, of The Cincinnati Museum Association, acting for and on behalf of said corporation, have hereunto subscribed their names and caused the official seal of said corporation to be hereunto affixed this second day of January, 1930.

C. J. Livingood, President. H. Gruesser, Secretary.
(Seal.)

UNITED STATES OF AMERICA,
State of Ohio,
Office of the Secretary of State:

I, Clarence J. Brown, Secretary of State of the State of Ohio, do hereby certify that the foregoing is an exemplified copy, carefully compared by me with the original record now in my official custody as Secretary of State, and found to be true and correct, of the

Certificate of Amendment
of
The Cincinnati Museum Association

filed in this office on the 3rd day of Jan., A. D. 1930, and recorded in Volume 383, page 29, of the Records of Incorporations.

Witness my hand and official seal, at Columbus, this 3rd day of Jan., A. D. 1930.

(Signed) Clarence J. Brown, Secretary of State.
(Seal.)

[fol. 61] EXHIBIT O

Organization Meeting of Trustees

The Board of Trustees of the Charles Phelps Taft Memorial Fund met at the residence of Mr. Semple on Wednesday, October 1, 1930.

Present: Herbert G. French, William T. Semple, Louise Taft Semple, Robert A. Taft.

Mr. Semple acted as Chairman of the meeting and Mr. Taft as Secretary.

Mr. Taft read to the Board the letter of Mrs. Charles P. Taft to the Board of Directors of the University of Cincinnati and the reply, and on motion it was unanimously resolved that said letter and the reply thereto be set out in the minutes of this meeting. They are as follows:

Cincinnati, Ohio, May 3, 1930.

To the Board of Directors of the University of Cincinnati, Cincinnati, Ohio.

GENTLEMEN:

I desire to establish a fund, to be known as the Charles Phelps Taft Memorial Fund, to be used to assist, maintain and endow the study and teaching of "The Humanities" in the College of Liberal Arts and the Graduate School of the University of Cincinnati. For the present I desire to have this fund administered by a Board of Trustees, consisting of Louise Taft Semple, William T. Semple, Robert A. Taft, Herbert G. French and myself, and I will make available for them during the ensuing year, the sum of Fifty Thousand Dollars ($50,000), during the following year the sum of Seventy-five Thousand Dollars ($75,000), and in each year thereafter the sum of One Hundred Thousand Dollars ($100,000), or such other income as may be derived from a fund of Two Million Dollars ($2,000,000) which I will ultimately arrange to transfer to such Trustees. Pending the complete transfer of the principal of this fund, I will guarantee all obligations which the Trustees may assume within the [fol. 62] limits of the income above set out. The Trustees shall have a wide discretion in defining the term "The Humanities" and the purposes for which the income shall be used, but no expenditure shall be made by the Board of

Trustees except in accordance with plans prepared within the College of Liberal Arts and the Graduate School and approved by the Board of Directors of the University.

I establish this fund as a memorial to my husband, Charles Phelps Taft, whose interest in the advance of culture and art included an especial interest in the progress of the University of Cincinnati, and a real enthusiasm for those studies which relate rather to the improvement of the mind than to physical and material betterment.

It is my belief that the University of Cincinnati is one of our most powerful agencies for strengthening the intellectual and spiritual values already so highly developed in Cincinnati. I realize that this particular gift is confined to one aspect of that development, but the activities of the University are so varied that it is impossible for any one person to cover the entire field, or even to cover completely one phase of the subject. My particular interest is in bringing about a concentration of interest upon that group of ideas which is generally known as "The Humanities," hoping that others may be inspired to join in the same work or other work of the University. In referring to "The Humanities," I include particularly literature and language, philosophy and history, and with these I have also in mind economics and mathematics. Without wishing to lessen, or to regard in any way lightly, the great efforts being put forth for the material and physical betterment of mankind, to which great funds are everywhere being devoted, I believe that there is some danger of a lack of emphasis on the value of thought and conduct and character, and I have therefore confined my gift to "The Humanities," which are concerned particularly with the development of ideas, of thought and of character.

I should be obliged if you would let me know if the estab-
[fol. 63] lishment of the Charles Phelps Taft Memorial Fund is acceptable to your Board.

Sincerely yours, (Signed) Annie Sinton Taft.

Cincinnati, Ohio, May 6, 1930.

Mrs. Charles P. Taft, Cincinnati, Ohio.

DEAR MRS. TAFT:

The following is an extract from the minutes of a meeting of the Board of Directors of the University of Cincinnati held on May 6, 1930:

"The following communication was received from Mrs. Annie Sinton Taft:

(Here appears the letter written above.)

On motion of Mr. Dinsmore, the gift was accepted and the President instructed to extend the thanks and sincere appreciation of the board to Mrs. Taft for this magnificent addition to the University Endowment."

Very truly yours, (Signed) Daniel Laurence, Clerk of the Board of Directors.

Cincinnati, Ohio, May 7, 1930.

My Dear Mrs. Taft:

Your generous gift has stirred the emotions of the whole University group beyond anything which has happened in my twenty-seven years of experience here. The sincere and spontaneous expressions in the Board meeting yesterday and the many very genuine statements which I have heard today all voice the same thought, profound appreciation of the gift and particularly of the purposes which prompted it. [fol. 64] Any words at my command would be most inadequate to give you a picture of the genuine feeling coming from all of the University groups,—the Board of Directors, the various Faculties, the Alumni, and the student body; and all of them speak of the memorial as a most fitting tribute to the gentle and beautiful character of Mr. Taft.

May I add a personal note of deep gratification on the emphasis you placed on the spiritual side of life as it should be developed in the University? It was most graciously and most beautifully expressed.

Cordially yours, (Signed) Herman Schneider, President.

Mrs. Charles Phelps Taft, 316 Pike Street, Cincinnati, Ohio.

On motion of Mr. Taft, Mr. Herbert G. French was unanimously elected Chairman of the Board.

On motion of Mr. Taft, Mr. Semple was unanimously elected Vice-Chairman of the Board.

On motion of Mrs. Semple, Mr. Taft was unanimously elected Secretary.

Mr. Taft stated that he had received from Mrs. Charles P. Taft her check for Fifty Thousand Dollars ($50,000) in payment of the income for the first year, and moved that the money be deposited in the First National Bank of Cincinnati and The Central Trust Company, or either of said banks, in the names of Herbert G. French, William T. Semple and Robert A. Taft, with instructions to the bank to honor checks signed by any two of the aforesaid. The motion was seconded by Mrs. Semple and unanimously adopted.

The Board discussed the methods to be followed in the expenditure of the income available to the Trustees.

On motion the meeting adjourned.

(Signed) Robert A. Taft, Secretary.

[fol. 65] Meeting of Trustees

The Trustees of the Charles Phelps Taft Memorial Fund met pursuant to call on Wednesday afternoon, December 10, 1934, at 4:00 P. M., at 315 Pike Street.

Present: Herbert G. French, William T. Semple, Louise Taft Semple, Robert A. Taft.

Mr. Semple presented to the Trustees the report of the Faculty Committee appointed at the request of the Trustees, which they proposed to submit to the Board of Directors of the University of Cincinnati, and attached thereto the report of the Subcommittee on Library and the Subcommittee on Publications. After a consideration of the report, Mr. Taft offered the following resolution:

Resolved: That the Trustees appropriate the sum of Thirty Thousand Dollars ($30,000), subject to the approval of the Board of Directors of the University of Cincinnati, for the acquisition, binding, and cataloguing of books for the University Library, to be expended immediately under the supervision of the Subcommittee on Library, of which Mr. R. P. Robinson is chairman.

The resolution was unanimously adopted.

Mr. Taft then offered the following resolution:

Resolved: That the Trustees appropriate a sum not in excess of Thirty-eight Hundred Dollars ($3800), subject to the approval of the Board of Directors of the University of

Cincinnati, to assist in the publication of the following books:

1. God in Greek Philosophy, by R. K. Hack,
2. A critical edition of The Bondman, by Philip Massinger, edited with introduction and commentary by Benjamin T. Spencer,
3. Ludwig Tieck and England, by E. H. Zeydel,

this sum to be expended under the general supervision of the Subcommittee on Publications, of which Mr. Robert Shafer is chairman.

The resolution was unanimously adopted.

The question of the disbursement of the funds of the Trustees was discussed, and Mr. Semple reported regard- [fol. 66] ing a conference with Mr. Daniel Laurence, Vice-President of the University of Cincinnati. It was the sense of the meeting that as appropriations are made by the Trustees, Mr. Laurence be notified of the amount and the purpose of the appropriation, and that the Trustees agree to turn over the funds to him from month to month as the expenditures are made and he requests payment. No formal action was taken, pending definite arrangements with Mr. Laurence regarding the procedure.

On motion of Mr. Semple, it was unanimously resolved:

Resolved: That the Secretary be instructed to address a letter to the Board of Directors of the University of Cincinnati, stating that the Trustees had considered the report of the Faculty Committee transmitting the report of the Subcommittee on Library and the Subcommittee on Publications, and that if this report is approved by the Board of Directors of the University of Cincinnati, the Trustees will make available to the Board of Directors the funds necessary to carry out these recommendations.

On motion of Mr. Semple, it was unanimously resolved that the report of the Faculty Committee and Subcommittees be set out in the minutes of this meeting, and they are as follows:

December 8, 1930.

The Faculty Committee of the Charles Phelps Taft Memorial Fund recommends to the President and to the

Board of Directors of the University of Cincinnati, for favorable action, the two enclosed reports presented to it (a) by its Subcommittee on Library and (b) by its Subcommittee on Publications. Both these reports have been approved in toto by the Faculty Committee, the first at a meeting on December 4, the second at a meeting on December 5, 1930.

Accompanying this request, for favorable action by the Committee of the Board of Directors and the Board itself and the Trustees of the Fund, is a statement of general principles and the plan of procedure formulated by the Faculty Committee at its meeting on October 24, 1930, and [fol. 67] definitely adopted (with a few changes incorporated here) at a meeting on December 4. It would seem desirable that the Committee of the Board of Directors should consider this statement of principles and the plan of procedure proposed and adopted by the Faculty Committee.

Very respectfully, Frank W. Chandler, Chairman.

Report of the Subcommittee on Library

To the Faculty Committee for Administering the Charles Phelps Taft Memorial Fund:

Your Subcommittee on Library has the honor to make the following recommendations:

I.

A. That an immediate appropriation of not less than $30,000 be allowed for the acquisition of books.

B. That this fund shall be used for purchasing such books and periodicals as are, or may be, needed both for graduate and undergraduate study and for faculty research, but that no portion of this fund shall be used for the purchase of duplicate copies with the exception of such reference works as may be needed in the various special reading rooms in addition to those now in general reference reading room.

It is the sentiment of the Subcommittee that such duplicates as may be necessary for instructional purposes should be bought through the departmental allowances from the general library budget, and that any department finding its appropriation from the general budget insufficient to cover

its needs for duplicates should request of the Faculty Committee a special grant of "funds in aid."

II

A. That from the total appropriation of $30,000 each of the eight departments concerned be allotted immediately the sum of $2,000.

B. That each of the departments shall establish a system whereby its members will bring to the attention of the head [fol. 68] of the department, or to a member detailed by him, their various requirements for books and periodicals.

C. That the head of the department, or the person designated by him, shall pass upon the recommendations of the various members, and shall authorize the purchase of books and periodicals through the University library.

III

That from the balance of $14,000 a sum not to exceed $2,500 be placed at the disposal of the Director of Libraries for the employment of such additional help and the purchase of such material as will be necessary in the ordering and cataloguing of books to be bought from the Fund.

The Subcommittee makes the above recommendation with considerable reluctance, as it feels that it is not a proper demand upon the fund allotted for the purchase of books, and that the University should meet the expense of additional library salaries as soon as possible. However, it feels that books are not really available for use until properly catalogued, and it recognizes the present situation regarding University resources.

IV

A. That the remaining sum of $11,500 be used at the discretion of the Subcommittee for the purchase of such books as will be valuable for any or all of the departments concerned.

B. That recommendations for purchases from the above-mentioned fund shall normally be passed upon by the Subcommittee as a whole, but that in cases where haste is imperative the Chairman shall be authorized to act at his discretion upon the recommendation of any member of the Sub-

committee in the placing of orders up to the sum of $500 for any single item, and that all such purchases shall be reported to the Subcommittee at its next meeting.

It is understood that this fund will be used primarily for the purchase of books of more advanced scholarly interest.

V

That the Director of Libraries shall have prepared a special book-plate, a copy of which shall be placed in every book purchased from the Taft Memorial Fund.

[fol. 69] The Subcommittee realizes that numerous matters not included in the above recommendations will in all probability claim its attention. However, in view of the pressing need for additional books and periodicals felt by the various departments, it is loath to delay the presentation of this report. Furthermore, it is convinced that many of the details of procedure can properly be understood only after a plan for the acquisition of books has been put into effect.

Finally, the Subcommittee does not intend that the policies determining its recommendations for future years shall necessarily be bound by the above recommendations, which are concerned only with the current academic year.

Respectfully submitted, Van Meter Ames, Beverley Bond, Jr., Harris Hancock, E. A. Henry, W. W. Hewett, M. J. Hubert, Robert Shafer, E. H. Zeydel, R. P. Robinson, Chairman.

Report of Subcommittee on Publications

December 5, 1930.

To the General Committee of the Faculties on the Charles Phelps Taft Memorial Fund:

Your Subcommittee on Publications recommends that at this time the sum of Ten Thousand Dollars ($10,000) be appropriated by the Trustees of the Charles Phelps Taft Memorial Fund for the purpose of affording aid in the publication of scholarly works in the field of the humanities (including economics and mathematics) written by members of this University.

Your Subcommittee has at present before it the request of Dean Louis T. More, Director of the Press, for aid to enable

the University to undertake immediately publication of the following books:

God in Greek Philosophy, by Professor R. K. Hack. (This title, we judge, may be merely provisional; but it is the title used by Dean More in his request.)

[fol. 70] A critical Edition of The Bondman, by Philip Massinger, edited with introduction and Commentary by Benjamin T. Spencer.

Ludwig Tieck and England, by Professor E. H. Zeydel.

Dean More states that the "Board of the Press has passed on these manuscripts and has submitted them to competent critics for advice," and he adds: "They have been unanimously recommended for publication as works of a high order of scholarship and composition." It is estimated, further, that the cost of manufacture, for these three books, will be not more than as follows: Hack $1310 (definitely ascertained); Spencer, $2,000 (preliminary estimate); and Zeydel, $2,000 (preliminary estimate);—or a total $5310. Towards this amount the Graduate School has appropriated $1310, and Dr. Spencer has agreed to purchase on publication not less than 100 copies of his book (a revised doctoral dissertation, originally submitted to and accepted by the Department of English in the spring of 1930). It is estimated that Dr. Spencer will thus in effect contribute not less than $200 towards the cost of his book. Thus the aid requested from the Taft Memorial Fund for these books is a sum not in excess of $3800.

Your Subcommittee is satisfied that this aid is eminently desirable, and in full conformity with the purposes for which the Fund is established, and therefore recommends that the sum of $3800 be specifically allotted by the Trustees of the Taft Memorial Fund for aid in the publication of the above-named three books.

Your Subcommittee makes no further recommendation at present concerning the allotment of the balance of the $10,000 which the Trustees of the Fund are asked to appropriate for publications. It should be said, however, that the appropriation of this amount is considered advisable, not only on the general ground that additional manuscripts may be submitted to the Press at any time, but also, and in particular, because it has been made known to your Subcommittee that Professor Harris Hancock has completed a treatise on mathematics which he may soon submit to the

Press for publication, and that this treatise will be very expensive to print—one estimate of the cost running as high as $5700.

Your Subcommittee hopes soon, in conformity with its [fol. 71] instructions, to formulate and submit for approval a "policy of publications" for its future guidance.

Respectfully submitted, Eleanor Bisbee. George F. Howe. Charles Napoleon Moore. Allen Brown West. Robert Shafer, Chairman.

P. S.—We understand that future regulations to be adopted by the Committee concerning author's royalties and the return of proceeds from sale of books shall apply to Dr. Spencer's and Professor Zeydel's books.

On motion the meeting adjourned.

(Signed) Robert A. Taft, Secretary.

I, Robert A. Taft, hereby certify that I am secretary of the Board of Trustees of the Charles Phelps Taft Memorial Fund, and that the foregoing is a true and correct copy of the proceedings had by said trustees at the meetings held on October 1, 1930, and December 10, 1930.

(Signed) Robert A. Taft, Secretary, Board of Trustees, Charles Phelps Taft Memorial Fund.

EXHIBIT P

Excerpt from Minutes of Meeting of Board of Directors of the University of Cincinnati, Held on January 6, 1931

"The following letter of Mr. Robert A. Taft, relating to a report received from the Taft Memorial Fund Faculty Committee, was ordered spread upon the minutes:

January 2, 1931.

Mr. Arthur R. Morgan, Chairman, Board of Directors of the University of Cincinnati.

DEAR SIR:

At a meeting of the Trustees of the Charles Phelps Taft Memorial Fund recently held, I was instructed to address [fol. 72] a letter to the Board of Directors of the University

of Cincinnati, stating that the Trustees had considered the report of the Faculty Committee on expenditures from the said Taft Memorial Fund, transmitting to your Board the report of the Subcommittee on Library and the Subcommittee on Publications, and stating to you further that if this report is approved by the Board of Directors of the University of Cincinnati, the Trustees of the Taft Memorial Fund will make available to you the funds necessary to carry out these recommendations in the sum of $33,800.

Respectfully yours, Robert A. Taft, Secretary, Board of Trustees of the Charles Phelps Taft Memorial Fund.

On motion of Mr. Morgan, seconded by Mr. Dinsmore, the report of the Faculty Committee was approved and their recommendations adopted, the vote on this motion being:

Yeas: Messrs. Brown, Dinsmore, French, Jaffee, Morgan, Straehley and Chairman Warrington."

I, Daniel Laurence, hereby certify that I am the Secretary of the Board of Directors of the University of Cincinnati, and that the foregoing is a true and correct copy of some of the minutes of the meeting of said Board of Directors held on January 6, 1931.

(S.) Daniel Laurence, Secretary, Board of Directors of the University of Cincinnati.

[fol. 73] BEFORE UNITED STATES BOARD OF TAX APPEALS

PRÆCIPE FOR RECORD—Filed October 5, 1936

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the Petition for Review by the said Circuit Court of Appeals for the Sixth Circuit heretofore filed by Robert A. Taft, Executor of the Estate of Anna Sinton Taft, Deceased:

1. Docket Entries of the proceedings before the Board.
2. Pleadings before the Board as follows:

(a) The amended petition, omitting therefrom the following:

(1) Exhibit A attached to the amended petition, being a certified copy of the appointment of the Executors;

(2) Exhibit C, being a copy of letter waiving restriction on assessment.

(b) Answer to amended petition.

3. Findings of fact, opinion and judgment of the Board of Tax Appeals.

4. Petition for Review, together with proof of service of notice of the filing thereof, and of service of a copy of the Petition for Review.

5. All orders enlarging time for the preparation of the Statement of Evidence and the transmitting and delivering of documents to the Clerk of the Court. (Not included in record.)

6. Statement of the Evidence settled or agreed upon.

7. This Praecipe.

John H. More, Attorney for Robert A. Taft, Executor of the Estate of Anna Sinton Taft, Deceased.

Service of a copy of the within Praecipe is hereby admitted this 3rd day of October, 1936.

Herman Oliphant, Counsel for Respondent on Review.

[fol. 74] Clerk's certificate to foregoing transcript omitted in printing.

BEFORE UNITED STATES BOARD OF TAX APPEALS

ORDER ENLARGING TIME

On motion of counsel for the petitioner, it is

Ordered: That the time for preparation of the evidence and transmisssion and delivery of the record sur petition for review of the above entitled proceeding by the United States Circuit Court of Appeals, Sixth Circuit, be and it is hereby extended to September 8, 1936.

(Signed) Eugene Black, Member.

Dated, Washington, D. C., July 2, 1936.

Now, October 12, 1936, the foregoing is certified from the record as a true copy.

B. D. Gamble, Clerk, U. S. Board of Tax Appeals.
(Seal.)

[fols. 75-76] BEFORE UNITED STATES BOARD OF TAX APPEALS

ORDER ENLARGING TIME

On motion of counsel for the petitioner, it is

Ordered: That the time for preparation of the evidence and transmission and delivery of the record sur petition for review of the above entitled proceeding by the United States Circuit Court of Appeals, Sixth Circuit be and it is hereby extended to October 8, 1936.

(Signed) C. Rogers Arundell, Member.

Dated, Washington, D. C., Sept. 2, 1936.

Now, October 12, 1936 the foregoing is certified from the record as a true copy.

B. D. Gamble, Clerk, U. S. Board of Tax Appeals.
(Seal.)

BEFORE UNITED STATES BOARD OF TAX APPEALS

ORDER ENLARGING TIME

For cause appearing of record, it is

Ordered: That the time for transmission and delivery of the record sur petition for review of the above entitled proceeding by the United States Circuit Court of Appeals, Sixth Circuit, be and it is hereby extended to October 31, 1936.

(Signed) Eugene Black, Member.

Dated, Washington, D. C., October 8, 1936.

Now, October 12, 1936 the foregoing is certified from the record as a true copy.

B. D. Gamble, Clerk, U. S. Board of Tax Appeals.
(Seal.)

[fol. 77] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MINUTE ENTRY

Cause Argued and Submitted October 13, 1937

Before Hicks, Simons and Nevin, JJ.

This cause is argued by Robert A. Taft for Robert A. Taft, Executor, etc., and by L. W. Post for Commissioner of Internal Revenue and is submitted to the court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

DECREE—Filed November 2, 1937

Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged, and decreed by this Court that the order or decree of the said Board of Tax Appeals in this cause be and the same is hereby affirmed.

[fol. 78] IN UNITED STATES CIRCUIT COURT OF APPEALS

OPINION—Filed November 2, 1937

Before Hicks and Simons, Circuit Judges, and Nevin, District Judge

SIMONS, Circuit Judge:

Each petition raises the question whether benefactions of Anna Sinton Taft, deceased, are properly deductible from her gross estate in computation of estate taxes under the Revenue Act of 1926. The Commissioner of Internal Revenue determined a deficiency, which the Board of Tax Appeals in some respects reversed and in others affirmed. 7544

is the petition of the executor, and 7545 the petition of the Commissioner, to review the order of the Board.

The claims against the estate of the decedent which were disallowed as deductions from her gross estate consisted of pledges; to establish a $2,000,000 fund at the University of Cincinnati to endow the study and teaching of the "humanities" styled the Charles Phelps Taft Memorial Fund; to provide the Cincinnati Institute of Fine Arts with funds to employ two additional musicians for the Cincinnati Symphony Orchestra; to contribute toward the salary of a Director of Art for the Institute; and to provide funds for the University to pay the salary of a professor to conduct a course in musical appreciation. The offers were accepted by the several institutions, and commitments made by them in reliance thereon. Claims allowed consisted of pledges to educational, religious and philanthropic institutions contingent on other pledges equalling or exceeding in amount the sums pledged, an agreement with the owner of the Cincinnati Conservatory of Music for the transfer of that school to the Cincinnati Institute of Fine Arts in return for annuities to be paid to her and another, and an agreement to finance a research expedition and the publishing of a work thereon.

Mrs. Taft died in 1931, and in claiming deductions from her gross estate in his inheritance tax return, the executor relied upon § 303 of the Revenue Act of 1926. Insofar as applicable it reads:

"For the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a resident, by deducting from the value of the gross estate—

(1) * * * Claims against the estate * * * to the [fol. 79] extent that such claims * * * were incurred or contracted bona fide and for an adequate and full consideration in money or money's worth.

* * * * * * *

(3) The amount of all bequests, legacies, devises, or transfers, to or for the use of * * * any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to chil-

dren or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual * * *."

The specific questions involved in the executor's petition are whether the various obligations incurred by Mrs. Taft during her lifetime were "incurred or contracted bona fide and for an adequate and full consideration in money or money's worth" under sub-section (a) (1), or in the alternative whether her pledges to charitable, artistic and educational institutions were "transfers" within the meaning of sub-section (a) (3). In respect to the first it is urged that since each pledge constitutes under the laws of Ohio a legally binding obligation on the executor which he is required to discharge by the payment of cash out of the estate, was incurred in good faith without purpose to avoid inheritance tax, and for a valuable consideration sufficient under Ohio law to support a contract, all of the conditions required by the statute are present, and the resulting claims are deductible within the meaning of § 303 (a) (1).

That the obligations incurred by the decedent were enforceable under Ohio law, or that they were incurred in good faith, is not challenged. It is not disputed that the gratification which a donor may derive from contributions to religious, philanthropic or educational enterprises supplies, under applicable local law, the consideration necessary to sustain a contract to contribute. The real controversy in relation to sub-section (a) (1) is whether the consideration for each promise was "adequate and full in money or money's worth" within the meaning of the statute.

It is no longer open to dispute that except where the taxable nature of interests is left to be determined by local [fol. 80] law, their subjection to or exemption from Federal taxation is controlled by the taxing statute and no other, for as was said in Burnet v. Harmel, 287 U. S. 103, 110, "The state law creates legal interests but the Federal statute determines when and how they shall be taxed," or as in Weiss v. Weiner, 279 U. S. 333, 337, "The act of Congress has its own criteria, irrespective of local law." Insofar as it is suggested that present deductions should be sustained on the ground that they would have been unquestioned had the sums pledged been paid during the decedent's lifetime, or been made the subject of testamentary disposition, the

answer it to be found in the recent case of Founders General Co. v. Hoey, 300 U. S. 268, 275, where it was said, "To make the taxability of the transaction depend upon the determination whether there existed an alternative form which the statute did not tax would create burden and uncertainty."

Courts which sustain the executor's view of the meaning to be ascribed to the language of sub-section (a) (1), Turner v. Commissioner, 85 Fed. (2d) 919 (C. C. A. 3); Commissioner v. Bryn Mawr Trust Co., 87 Fed. (2d) 607 (C. C. A. 3); United States v. Mitchell, 74 Fed. (2d) 571 (C. C. A. 7); In re Atkins Estate, 30 Fed. (2d) 761 (C. C. A. 5), apparently do so upon the assumption that the phrase connotes no more than a "valuable" consideration or one sufficient in law to support a promise. So it was said in the Third Circuit (the Bryn Mawr Trust Company case), "It is an elementary rule that a legal consideration may take the form either of a benefit to the promisor or a detriment or loss to the promisee," and in the Fifth Circuit (the Atkins Estate case), "Under the law of Louisiana, which is controlling, regardless of decisions to the contrary in other states, there was sufficient consideration for the notes." But that something more than this must be the fair intendment of its careful phrasing clearly appears when we trace the historical evolution of § 303 (a) (1). In corresponding sections of the Revenue Acts of 1918 and 1921, claims against an estate might, without limit, be deducted when they were such as were allowed by the laws of the jurisdiction under which the estate was administered. In the 1924 Act they were required to have been incurred "For a *fair* consideration in money or money's worth." [fol. 81] In the 1926 Act, here applicable, a "fair" consideration became an "adequate and full consideration."

Since by all accepted rules of interpretation changes in the wording of statutes must be construed, in the absence of other implications, as denoting intent to change the law, for legislatures are not presumed to do vain things, it seems clear that claims are no longer to be tested by the laws of the jurisdiction under which estates are being administered, nor even by such connotation as may in the past have been given to the phrase "fair consideration." Something more than that is required to establish an allowable deduction, and we see no occasion to give to the language of the

1926 Act any but its plain and ordinary meaning. This is the view held in the Second Circuit, Porter v. Commissioner of Internal Revenue, 60 Fed. (2d) 673, 675, affirmed without discussion on this point, 288 U. S. 436, in the Eighth Circuit, in Glaser v. Commissioner, 69 Fed. (2d) 254, and in the dictum announced by this court in Latty v. Commissioner, 62 Fed. (2d) 952. With full consideration to the recognized policy of the Congress to encourage and to relieve from onerous tax exactions gifts to charitable, religious, and educational institutions, and however "precious and priceless," to borrow a phrase from the Turner case, supra, the ability to gratify desire in this respect may be to the philanthropic donor, yet measured by the precise tests of the statute, the promised donations here under consideration are but gifts, and there is no support for them as claims against the estate which may be deducted, of that full and adequate consideration in money or money's worth that is the unavoidable requirement of the statute. This is without consideration to the Commissioner's contention, hereinafter discussed, that the statutory provision in question relates only to claims arising out of financial transactions and to those wherein the consideration moves to the decedent and augments his estate.

Failing relief under § 303 (a) (1) the executor urges in the alternative that the decedent's pledges here involved are transfers to the use of corporations organized and operated exclusively for religious, charitable and educational purposes under sub-section (a) (3). There is support for [fol. 82] that view in Porter v. Commissioner, supra, although reasons for arriving at decision in this respect are not elucidated by the court. Affirmance of the Porter case does not control us upon the point in issue, for it was not presented in the application for certiorari and is not in the affirming opinion discussed. Nor do Turner v. Commissioner, supra, and Commissioner v. Bryn Mawr Trust Co., supra, add anything of persuasiveness to the Porter case, since the Third Circuit Court of Appeals considered itself concluded by its affirmance. Notwithstanding the cited decisions, it is difficult to understand how a pledge, unexecuted during the life of the promissor, however binding under local law, may constitute a transfer. This is the view taken by the court in Glaser v. Commissioner, supra, and is supported by the history of the provision. The 1918 Act in the same environment used the word "gifts." This was

changed to "transfers" in the 1921 Act, and it has so remained in the Revenue Acts of 1924 and 1926. The most that can be said, we think, in the instant case is that the decedent had contemplated a transfer and had promised to make one. We are unable to conclude that the transfer, if ever it is made, will relate back to the promise to make it, especially as there was by the decedent no allocation of funds or securities to the carrying out of the pledge. None of the several pledges of the class involved in the executor's appeal require the application of a different principle, and his petition must be overruled.

The deductions from gross estate sustained by the Board and now challenged by the petition of the Commissioner stand on a different footing. In respect to each of them full and adequate consideration may clearly be recognized. In respect to pledges which were contingent upon sums being contributed by others equal to or in excess of the decedent's pledge the consideration is money, and in respect to other claims, such as annuities in return for the transfer of the Cincinnati Conservatory of Music to the Institute of Arts and the work of scientific men in a research and publishing enterprise, the consideration is property or services. The argument of the Commissioner in respect to them is that the statute contemplates that consideration must move to the decedent and augment her estate, and that the claims must arise in financial or business transactions. There is some [fol. 83] such view indicated by Judge Hickenlooper in the Latty case, supra. It is but dictum, however, and even so there is recognition that "There are instances in which it is practically impossible to say that a fair consideration is not to be regarded as a consideration in money or money's worth," citing Ferguson v. Dixon, 300 Fed. 961 (C. C. A. 3). The weight of authority, however is clearly to the effect that deductions for claims are nowhere in the statute conditioned upon the consideration supporting them moving to the decedent, although in the usual case that situation will probably exist. The phrasing of the statute is clear, and we see no necessity for reading into it a condition not there expressed. This is the view held by most of the courts which have had occasion to interpret the section. "We need not limit it to cases where the consideration passes to the testator," Porter v. Commissioner, supra, and to the same effect United States v. Mitchell, supra, Commissioner v. Bryn

Mawr Trust Co., supra, and the recent case of Carney v. Benz, 90 Fed. (2d) 747, 749, (C. C. A. 1).

It has on occasion been suggested, arguendo, that this section of the statute relates only to financial or business transactions, a suggestion receiving some support from the language of the Glaser, Porter and Benz cases. It seems to us, however, sufficient to say that there is in our view no more occasion for reading into the statute a limitation that confines allowable deductions to those claims which arise in business or financial transactions than to read into it a limitation which confines it to claims based upon consideration which moves to and augments the decedent's estate. The Commissioner's petition to review should likewise be overruled.

The order of the Board of Tax Appeals is affirmed.

[fol. 84] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 85] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 7, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 42,227. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 746. Robert A. Taft, Executor of the Estate of Anna S. Taft, Deceased, petitioner, vs. Commissioner of Internal Revenue. Petition for a writ of certiorari and exhibit thereto. Filed February 1, 1938. Term No. 746, O. T., 1937.

FILE COPY

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1937

No. 746

ROBERT A. TAFT, EXECUTOR OF THE ESTATE OF ANNA S. TAFT, DECEASED,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN SUPPORT OF PETITION

ROBERT A. TAFT,
Attorney for Petitioner.

TAFT, STETTINIUS & HOLLISTER,
of Counsel.

603 Dixie Terminal Building,
Cincinnati, Ohio.

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1937

No.

ROBERT A. TAFT, EXECUTOR OF THE ESTATE OF ANNA S. TAFT, DECEASED,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

Your Petitioner, Robert A. Taft, as the Executor of the Estate of Anna S. Taft, Deceased, prays that a writ of certiorari be issued to the United States Circuit Court of Appeals for the Sixth Circuit to review the judgment of that Court in the above-entitled cause of action, and respectfully shows to this Honorable Court as follows:

Judgment Below

The judgment of the United States Circuit Court of Appeals for the Sixth Circuit was entered November 2, 1937 (R. p. 77), affirming the judgment of the United States Board of Tax Appeals, entered February 11, 1936 (R. p. 32).

STATEMENT OF CASE

Your Petitioner is Executor of the Estate of Anna S. Taft, who died on January 31, 1931, a resident of Cincinnati, Ohio. Your Petitioner, in filing the Federal Estate Tax Return for her estate, claimed as deductions for the purpose of determining the net estate, subject to estate tax under the Revenue Act of 1926, the amounts owing at her death on the following contractual obligations which she had entered into prior to her death:

	Amount Owed At Death
1. A contract with the University of Cincinnati to establish a fund at the University to be known as the "Charles Phelps Taft Memorial Fund"	$2,000,000.00
2. A contract with the Cincinnati Institute of Fine Arts to provide it with funds to employ two additional men in the Cincinnati Symphony Orchestra for the year 1930-31, if the Orchestra would employ such additional men	3,920.00
3. A contract with the Cincinnati Institute of Fine Arts to contribute $10,000.00 per annum towards the salary of a director of art for the Institute if the Institute would employ such director	10,000.00
4. A contract with the University of Cincinnati to provide it with funds to pay the salary of Thomas Kelly if the University would employ Kelly as a professor to give a course in musical appreciation	1,500.00
Total	$2,015,420.00

The Commissioner of Internal Revenue disallowed these obligations as deductions, and both the Board of Tax Appeals and the United States Circuit Court for the Sixth Circuit affirmed the disallowance.

The facts concerning the entering into of these obligations are as follows:

1. The Contract with the University of Cincinnati to Establish Charles Phelps Taft Memorial Fund.

On May 3, 1930, Mrs. Taft addressed a letter to the Board of Directors of the University of Cincinnati (Stip. 28, R. pages 45-47) offering to establish a fund in memory of her husband, to be known as the Charles Phelps Taft Memorial Fund to be used to assist, maintain and endow the study and teaching of "The Humanities" in the University of Cincinnati. In this letter she stated that she would make available to certain Trustees for the University the sum of $50,000.00 during the ensuing year, the sum of $75,000.00 during the following year, and the sum of $100,000.00 in each year thereafter, or such other income as might be derived from a fund of $2,000,000.00, which she would ultimately arrange to transfer to such Trustees; that pending the complete transfer of the principal of this fund, she would guarantee all obligations which the Trustees might assume within the foregoing limitations, and that no expenditures should be made by the Trustees except in accordance with the approval of the Board of Directors of the University.

This offer was formally accepted by the Board of Directors of the University of Cincinnati by resolution adopted May 6, 1930 (Stip. Exhibit O, R. pp. 63, 64).

In accordance with this agreement, Mrs. Taft paid to the Trustees named in her letter, on September 30, 1930, the sum of $50,000.00 (R. p. 50). On December 10, 1930, the Trustees appropriated $33,800.00, subject to the approval of the Board of Directors of the University (Stip. Exhibit O, R. pp. 65-71). On January 6, 1931, the Board of Directors of the University approved the expenditures recommended by the Trustees (Stip. Exhibit P, R. pp. 71, 72). Prior to January 31, 1931, the date of Mrs. Taft's death, the books of the University

showed expenditures out of said appropriation amounting to $11,753.83 (R. p. 54, top).

Since Mrs. Taft's death, your Petitioner as Executor of her estate, up to the time of the hearing before the Board of Tax Appeals, had paid to the Trustees the total sum of $249,750.00, as interest on the principal of the fund, such interest being calculated at five per cent during the first few years, and three and one-half per cent during the latter years (R. p. 50).

The University is a municipal university under the laws of the State of Ohio, owned by the City of Cincinnati, governed by a Board of Directors appointed by the Mayor of the City, and without separate corporate existence from the City. Its work is purely educational, and no profit inures to any individual (Stip. Sec. 27, R. p. 45).

2. The Contract with The Cincinnati Institute of Fine Arts to Provide it with Funds to Employ Two Additional Men in the Cincinnati Symphony Orchestra.

The Cincinnati Institute of Fine Arts is a charitable corporation under the laws of Ohio, organized for the purpose of maintaining a symphony orchestra, music schools and art museums, and no profit inures to any individual. Mrs. Taft and her husband, Charles P. Taft, by deed of gift dated May 21, 1927, conveyed to it their house and collection of pictures and other works of art in the house, together with the sum of $1,000,000.00. This deed of gift was conditioned on the citizens of Cincinnati contributing a fund of $2,500,000.00 to the Institute to be used primarily for the support of the Cincinnati Symphony Orchestra, to which Mrs. Taft had theretofore contributed as much as $200,000.00 per year (Stip. 19, R. p. 44, Exhibit I, the original of which is filed with the record in case No. 7545 in the United States Circuit Court of Appeals, and by stipulation is made part of this record R. pp. 48-54). The campaign was successful and the Institute took over the operation of the orchestra for the orchestra year

1929-30. The Institute found that it would be necessary to reduce the size of the orchestra, as it did not have sufficient income to operate it. The director of the orchestra desired to retain two more men than the Institute would allow. Thereupon Mrs. Taft promised that if the Institute would retain two men, whom the director desired retained, she would pay to the Institute the amount of their salaries for the two years covered by the contracts of employment then being made. Relying on this promise, the Institute re-engaged these two men. Mrs. Taft paid the Institute $3,920.00 prior to her death, the amount of their salaries for the first year, and your Petitioner, as her Executor, paid the same amount to the Institute after her death to provide funds to pay their salaries for the second year (R. p. 48). The Institute would not have re-employed these men except for Mrs. Taft's agreement to pay the amount of their salaries (R. p. 52).

3. The Contract with The Cincinnati Institute of Fine Arts to Contribute $10,000.00 per annum towards the Salary of a Director of Art for the Institute.

On June 3, 1929, Mrs. Taft addressed a letter to the Institute stating that if it would employ a director of art, she would contribute $10,000.00 per annum towards his salary (Stip. 22, R. p. 44). Relying on this letter, the Institute engaged Mr. Walter H. Siple, then Assistant Director of the Fogg Art Museum in Cambridge, Massachusetts, at a salary of $10,000.00 per year. The Institute did not have sufficient funds to employ a director at such salary, and would not have done so except for Mrs. Taft's agreement (R. p. 53). The only connection the Institute had with art at that time was the Taft Collection in Mrs. Taft's residence, over which she retained control during her life, under the deed of gift of May 21, 1927. As a part of Mr. Siple's duties was to act as Curator of this collection, Mrs. Taft, by his employment, secured

his services to take care of this art collection during the time the collection remained in her possession (R. p. 53). Mrs. Taft paid this sum to the Institute for one and one-half years prior to her death, and your Petitioner, as her Executor, paid this sum for one year after her death (R. p. 49).

4. The Contract with University of Cincinnati to Provide Funds to Pay the Salary of Mr. Thomas James Kelly.

In the Spring of 1930 Mrs. Taft agreed with the University of Cincinnati that if it would engage Mr. Thomas James Kelly as a professor to give a course in musical appreciation during the academic year 1930-31, she would pay to the University the amount of his salary. She had made similar arrangements for some years prior to that time. The University employed Mr. Kelly, but would have not done so, except for her agreement to pay to the University the amount of his salary (R. p. 53). $1,500.00 was owed at the time of her death, which your Petitioner, as her Executor, has since paid to the University (R. p. 51).

STATUTES INVOLVED

The Statutes involved in this Petition are the following portions of Section 303(a) of the Revenue Act of 1926, in effect on January 31, 1931:

> "Sec. 303. For the purpose of the tax the value of the net estate shall be determined—
>
> "(a) In the case of a resident, by deducting from the value of the gross estate—
>
> "(1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages upon, or any indebtedness in respect to, property * * * to the extent that such claims, mortgages, or indebtedness were incurred or contracted bona fide and for an adequate and full consideration in money or money's worth,
>
> * * * * *

"(3) The amount of all bequests, legacies, devises, or transfers, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual ..."

QUESTIONS INVOLVED

The questions presented by this Petition are as follows:

1. Whether a promise to pay a sum of money to a corporation organized for charitable and educational purposes, accepted by such corporation and legally binding on the promisor, is a claim incurred or contracted bona fide, and for an adequate and full consideration in money or money's worth within the meaning of Section 303(a) (1) of the Revenue Act of 1926, so that the amount due under such promise at the time of promisor's death is deductible from her gross estate in determining the net estate subject to estate tax under the Revenue Act of 1926.

2. Whether a promise to pay a sum of money to a corporation organized for charitable and educational purposes, accepted by such corporation and legally binding on the promisor, and in reliance upon which and in accordance with the terms of which promise, the charitable corporation incurs an obligation to pay an equivalent sum of money to a third party for services to be rendered by such third party, is a claim incurred for an adequate and full consideration in money or money's worth within the meaning of said Section 303(a) (1) of said Act, so that the amount due under such promise at the time of the promisor's death is deductible from her gross estate in

determining the net estate subject to estate tax under the Revenue Act of 1926.

3. Whether a promise to pay a sum of money to a corporation organized for charitable and educational purposes, accepted by such corporation and legally binding on the promisor, is a transfer to or for the use of a corporation organized and operated exclusively for religious, charitable, scientific, literary or educational purposes, including the encouragement of art, within the meaning of Section 303(a) (3) of the Revenue Act of 1926, at the time such promise is accepted by the corporation, so that the amount remaining due under such promise at the time of the promisor's death is deductible from the amount of her gross estate in determining her estate tax under the Revenue Act of 1926.

REASONS FOR GRANTING THE WRIT

(1) *The United States Circuit Courts of Appeal are in conflict on the question of allowing such obligations as deductions under Section 303(a) (1)*

The Circuit Court of Appeals for the Sixth Circuit, in affirming the United States Board of Tax Appeals and disallowing the foregoing deductions claimed by Petitioner under Section 303(a) (1) of the Revenue Act of 1926, has laid down a rule which is in conflict with the decision of the United States Circuit Court of Appeals for the Third Circuit in *Turner v. Commissioner*, 85 Fed (2d) 919, and in *Commissioner v. Bryn Mawr Trust Company*, 87 Fed. (2d) 607. It is in agreement with the decisions of the United States Circuit Court of Appeals for the Eighth Circuit in *Glaser v. Commissioner*, 69 Fed. (2d) 254, (although that case may be disguished on its facts as there was no legally binding obligation) and the United States Circuit Court of Appeals for the Second Circuit in *Porter v. Commissioner*, 60 Fed. (2d) 673,

Bretzfelder v. Commissioner, 86 Fed. (2d) 713, and in *Lockwood v. McGowan, Collector of Internal Revenue*, 86 Fed. (2d) 1005. It is to be noted, however, that the Second Circuit actually allowed the deductions as transfers under Section 303(a) (3).

(2) *The United States Circuit Courts of Appeals are in conflict on the question of whether these contracts amounted to transfers under Section 303(a) (3).*

This decision of the Circuit Court of Appeals for the Sixth Circuit in disallowing these deductions as transfers under Section 303(a) (3), is also in conflict with the United States Circuit Court of Appeals for the Second Circuit in the *Porter, Bretzfelder* and *Lockwood Cases*, and with the United States Circuit Court of Appeals for the Third Circuit in the *Turner* and *Bryn Mawr Trust Company Cases.*

(3) *The questions are important ones under the estate tax laws and should be settled by the Supreme Court.*

The questions involved are of importance, for the reason that the question of the deductibility of pledges under either Section has never been passed on by this Court. In spite of the decisions in the Second and Third Circuits, the Commissioner of Internal Revenue continues to disallow, as deductions or as transfers, pledges of the character in question in this case. It is a very common occurrence for decedents to die leaving unpaid pledges. In most instances these pledges are not sufficiently large to justify appeals from their disallowance as deductions by the Commissioner of Internal Revenue, with the result that many estates are being forced to consent to the disallowance of similar deductions in spite of the decisions by the United States Circuit Courts of Appeal for the Second and Third Circuits.

The phrase "adequate consideration in money or money's worth," appears not only in this section of the Revenue Act but in many other sections. Its meaning should be settled by the Supreme Court.

WHEREFORE, it is respectfully submitted that this Petition for certiorari to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit should be granted.

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

OPINIONS BELOW

One opinion was delivered by the United States Board of Tax Appeals and was written by John M. Sternhagen. It appears on page 20 of the record and is reported in 33 B.T.A. 671. The opinion of the United States Circuit Court of Appeals for the Sixth Circuit (Circuit Judges Hicks and Simons, and Nevin, District Judge, Judge Simons writing) was filed November 2, 1937, and appears at page 78 of the record. It is reported in 92 Fed. (2d) 667.

JURISDICTION

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938, 28 U.S.C.A. 347.

The judgment of the United States Circuit Court of Appeals was entered on November 2, 1937.

STATEMENT OF THE CASE

The essential facts of the case are stated in the petition for certiorari, page 3, to which reference is hereby made.

SPECIFICATION OF ERRORS

We submit that the Circuit Court of Appeals for the Sixth Circuit erred:

1. In failing to find and hold that Mrs. Taft's promises to pay the above-mentioned sums of money to the University of Cincinnati, and to the Cincinnati Institute of Fine Arts were for adequate and full consideration in money or money's worth within the meaning of Section 303(a) (1) of the Revenue Act

of 1926, and hence deductible as claims against her estate in determining the net estate subject to estate tax.

2. In failing to find and hold that Mrs. Taft's promises to transfer these sums of money to the above-mentioned charitable corporations were transfers to such charitable corporations within the meaning of Section 303 (a) (3) of the Revenue Act of 1926, at the time that the offers were accepted by the corporations, and hence that the amounts owed under such promises at the date of Mrs. Taft's death were deductible from her gross estate in determining the net estate subject to estate tax.

3. In failing to find and hold that as a matter of evidence the employment of Professor Kelly by the University of Cincinnati was in consideration of Mrs. Taft's promise to pay to the University the amount of his salary.

SUMMARY OF ARGUMENT

I. The sum of $2,000,000.00 owed to the University of Cincinnati to establish the Charles Phelps Taft Memorial Fund is deductible for estate tax purposes either as a claim against the estate or as a transfer.

A. This indebtedness is deductible as a claim against the estate under Section 303 (a) (1) of the Revenue Act of 1926.

1. That this indebtedness is a legally binding obligation of the estate under the laws of Ohio, and was incurred bona fide has not been challenged.

2. The indebtedness was incurred for an adequate and full consideration in money or money's worth within the meaning of Section 303 (a) (1).

B. The execution of this binding pledge was a transfer to a charitable corporation deductible under Section 303 (a) (3) of the Revenue Act of 1926.

II. Additional reasons why the other obligations are deductible as claims against the estate, not applicable to the indebtedness to the University for the Charles Phelps Taft Memorial Fund.

ARGUMENT

I

The sum of $2,000,000.00 owed to the University of Cincinnati to establish the Charles Phelps Taft Memorial Fund is deductible for estate tax purposes either as a claim against the estate or as a transfer.

A. This indebtedness is deductible as a claim against the estate under Section 303(a) (1).

1. *That this indebtedness is a legally binding obligation of the estate under the laws of Ohio, and was incurred bona fide has not been challenged.*

The United States Board of Tax Appeals, (R. p. 24) and the United States Circuit Court of Appeals agree that this promise to establish the Charles Phelps Taft Memorial Fund became a binding obligation on Mrs. Taft upon acceptance by the University, and the binding obligation of your Petitioner, as her Executor, upon her death, and that this obligation was entered into bona fide. The Circuit Court said in its opinion (R. p. 79): "That the obligations incurred by the decedent were enforcible under Ohio law, or that they were incurred in good faith, is not challenged."

We wish to emphasis the fact, however, that the Supreme Court of the State of Ohio goes farther than the courts of other states in holding pledges to charitable institutions binding on the pledgor. It not only holds that such pledges are binding if given in consideration of the promises of others, or if the pledges are relied upon by the charitable corporation

and part of the money spent, but in the cases of pledges to universities, the Supreme Court of Ohio holds that the accomplishment of the purposes for which pledge was made and the University was formed is sufficient consideration. *Irwin Administrator v. Lombard University*, 56 O.S. 9. The syllabus in this case reads as follows:

> "The consideration of a promissory note executed to an incorporated college is an accomplishment of the purposes for which it is incorporated and in whose aid the note is executed; and such consideration is sufficient."

It should also be pointed out that by Section 7916* of the General Code of Ohio, municipal universities in Ohio, of which the University of Cincinnati is one, are specifically authorized to accept trust funds like the Charles Phelps Taft Memorial Fund.

In effect the consideration is the assumption by the University of the obligation to expend the income of the fund for certain stated purposes.

The only question, therefore, is whether this obligation to establish the Charles Phelps Taft Memorial Fund was incurred "for an adequate and full consideration in money or money's worth."

2. *The Indebtedness was Incurred for an Adequate Consideration in Money or Money's Worth.*

Prior to the Revenue Act of 1924, there was no provision limiting the deductibility of claims by any requirement as to the kind or amount of consideration. In that Act, however, a provision was added in Section 303(a) (1) which is similar to the provision in the 1926 Act, except that the word "fair" was used instead of "adequate and full." The report of the Ways and Means Committee shows that this limitation was inserted in the 1924 Act to make it conform with Section 302(c), (d)

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*See Appendix.

and (e) of the Act with regard to transfers made for less than full consideration. *Wade v. Commission*, 21 B.T.A. 339 at 345.

The purpose of inserting this qualification both in this section of the Act and in other sections was to prevent tax avoidance. Before this provision was inserted, claims against an estate might be deducted whenever they were supported by any legal consideration, even though such claims had been deliberately created for the purpose of permitting a deduction. Thus in any State where a sealed instrument imported consideration, an agreement to transfer assets under seal would have been deductible. Similarly, a man might make a contract with his children to transfer property for much less than its real value, thus creating a claim by his children against the estate. Obviously this purpose could not apply to the deductibility of binding pledges made to political subdivisions for public purposes, or to religious, charitable, scientific, literary and educational corporations. Transfers to such corporations, whether made prior to death in contemplation of death, or by will, are expressly deductible under Section 303(a)(3). If a man wishes to make such a bequest and avoid the inheritance tax thereon, he is expressly authorized and encouraged to do so.

The attempt to apply Section 303(a) (1) to exclude charitable pledges has this strange effect. A man may transfer property before his death to such an organization, thereby decreasing the total amount of his estate, and avoiding any inheritance tax on property so transferred. He may leave such property in his will and the amount thereof is deducted before determining the inheritance tax. But according to the Government's claim, if he makes a promise to transfer such property before his death, which promise is legally binding under the laws of the State where he lives on his executor and is carried out by his executor, he would be required to pay an inheritance tax thereon. Surely no Congress would deliberately intend such a ridiculous result.

The important words of the section are really the words "bona fide," indicating an intention to disallow deductions arising from claims entered into in an attempt to avoid the estate tax. It is obvious that the purpose of the provision does not in any sense apply to charitable pledges which are legally binding under the laws of the State.

The same conclusion must be reached if we analyze the actual words used in this section. The phrase "adequate and full consideration in money or money's worth" is a redundant one. Webster's New International Dictionary, Second Edition, defines "adequate" as "legally sufficient; such as is lawfully and reasonably sufficient." One of the definitions of "full" is "adequate." It is also defined as "complete or not wanting in any part." The same dictionary defines "money's worth" as "something worth money; a fair or full equivalent for the money paid."

From these definitions, we submit that the phrase means little more than a substantial consideration not obviously inadequate. It would not be met by a seal, which, after all, is not consideration at all, but merely a substitute for consideration under the laws of some States. It would not be met by the vague phrase "in consideration of love and affection," because it is obvious that "love and affection" is not a consideration at all and has never been considered as such. It is also clear that if a man agrees to transfer a building worth $100,000.00 to his son for $5,000.00, the requirement of "adequate and full' consideration is not met. But we submit that when the consideration is the promise of other persons to contribute money, the promise of the university to undertake certain work, the agreement of an institution to employ men and do various other things which they would otherwise not do, there is no way in which the courts can question the adequateness or fullness of the consideration. Obviously the person making the pledge considered that the

consideration was sufficient for the amount he was agreeing to give. Thus in the present case it is clear that the employment of additional professors, the purchase of additional books, the granting of aid to worthy students by the University of Cincinnati for all time to come was considered by Mrs. Taft to be worth the sum of $2,000,000.00. It is suggested that there is a limitation through the use of the words "money's worth." We respectfully submit that this really adds nothing to the requirement of adequate and full consideration. "Money's worth" may be the performance of charitable acts just as well as the transfer of property.

The respondent argued in this and other cases that this consideration must be received by the decedent and augment his estate, though this requirement was stricken from Article 36, Regulation 70 (1929 ed), by T. D. 4322 (X-2 C. B. 420) dated September 18, 1931. We see no justification for such a construction. If Congress had intended that the consideration must actually be received by the decedent, it could easily have so provided (as it did in Section 302(i) of the 1926 Act). To so construe the section would make necessary the disallowance of accommodation endorsements and guarantees of accounts actually enforced against the executor. Such claims have been held to be deductible by the Circuit Courts of Appeals in *United States v. Mitchell*, 74 Fed. (2d) 571, and *Carney v. Benz*, 90 Fed. (2d) 747, 749. It would also eliminate most claims arising from personal services, which are allowed without question.

It has been stated by the Court of Appeals for the Second Circuit, in *Porter v. Commissioner*, 60 Fed. (2d) 673, 675, that this section is limited to financial bargains, but certainly there is nothing in the meaning of the words to require such a restriction.

The words do not mean that the consideration paid or rendered by the promisee must necessarily be such consideration as an ordinary, prudent business man would have required under

similar circumstances. There is nothing in the section about ordinary, prudent business men. A bad bargain, entered into without intention of avoiding the tax, would be just as binding and just as deductible as a good bargain. We, therefore, submit that if the decedent entered into a transaction which he regarded as binding upon himself and his estate, and in which he considered that the other party to the bargain was doing or undertaking to do something worth the money he had contracted to give, then there is full and adequate consideration, whether the consideration moves to him or not, whether other people think it is adequate or not, providing it is not done for the purpose of avoiding the estate tax.

The Board of Tax Appeals in *Wade v. Commissioner*, 21 B.T.A. 339, which was the leading case on this question until the Circuit Court of Appeals cases discussed below, held that the pledges made by Mr. Wade during his lifetime were deductible. One of these pledges was represented by a note for $20,000.00, bearing interest at five per cent, payable at any time, but in any event, upon his death. In reliance upon this promise, the pledgee, a museum, included the interest in its budget in the years preceding Mr. Wade's death. This pledge was secured in a campaign in which other persons also made pledges. The Board held that this consideration of promises by others was adequate and full consideration for money or money's worth, and allowed the pledge to be deducted as a claim.

In *Porter v. Commissioner*, 23 B.T.A. 1016, however, the Board limited the applicability of the *Wade Case* to pledges made in consideration of other pledges. In this case the decedent made a subscription to Princeton University to provide funds for the construction of a memorial window in the chapel there. A balance of $5,000.00 was still due on the pledge at his death, but the University had contracted for and commenced construction of the window prior to his death. The Board held that there was no proof of an adequate and full

value in money or money's worth and refused to allow the deduction, distinguishing the *Wade Case* on the ground that payments of money by other pledgors met this requirement. The executor also claimed this pledge was deductible as a transfer under Section 303 (a) (3), but this claim was likewise denied. The Circuit Court of Appeals for the Second Circuit affirmed the Board on the first ground and reversed it on the second. This decision is discussed below.

The United States Circuit Court of Appeals' decisions, however, have not followed this line of distinction of the Board of Tax Appeals in these two cases, and there is a square conflict of authority in their decisions.

The United States Circuit Court of Appeals for the Third Circuit has held, in two cases, that a binding pledge not made in consideration of other pledges is incurred for a full and adequate consideration in money or money's worth, and is deductible as a claim against the estate.

In *Turner v. Commissioner*, 85 Fed. (2d) 919, the decedent had pledged $1,000,000.00 to the Young Men's Christian Association for a building in Jerusalem. Two-thirds of the pledge was still owing at his death, and the Circuit Court of Appeals for the Third Circuit held this balance to be deductible as a claim against the estate. The Court stated that in its opinion the consideration connected with binding educational, charitable and religious gifts is money or money's worth, saying (p. 920):

> "Within the meaning of the statute, 'money's worth' does not mean money itself. The ultimate question on this phase of the case is what consideration may be regarded as money's worth. Must it be material, such physical things as may be bought and sold in the open market? Or, may it be religious, charitable, or educational considerations which in some cases are not only 'adequate and full,' but are precious and priceless? We

are told that 'a good name is rather to be chosen than great riches.' Consideration connected with educational, charitable, or religious gifts may not be money in a commercial sense, but it does constitute money's worth in a higher sense, just as the knowledge that others are contributing to charitable institutions constitutes adequate and full consideration for one's gift though, as a matter of fact, the giver does not receive a single material thing. *Jeptha H. Wade, Jr., et al, v. Commissioner*, 21 B.T.A. 339."

In this same Circuit, in *Commissioner v. Bryn Mawr Trust Co.*, 87 Fed. (2d) 607, this Circuit Court, with two Judges sitting who did not sit in the Turner case, held that an unpaid balance of a pledge to a University in the sum of $60,000.00 could be deducted. The Court gave careful consideration to the question as to whether the consideration was full and in money or money's worth. Its opinion on this question is as follows, (p. 609):

"It remains, however, to consider whether the consideration was full and in money or money's worth. It is an elementary rule that a legal consideration may take the former either of a benefit to the promisor or of a detriment or loss to the promisee. As Mr. Storey said in Townsley v. Sumrall, 2 Pet. 170, 182, 7 L. Ed. 386: 'Damage to the promisee, constitutes as good a consideration as benefit to the promisor.' The consideration for the decedent's pledges here involved was of this latter character. Was this consideration full and in money or money's worth? We think the answer to this question must be in the affirmative. Assuming the consideration was the expenditure by the college of funds to carry out the objects contemplated by the decedent, it is clear that it was in money or money's worth since these expenditures were in money, and it cannot be doubted that the consideration was full since all the funds subscribed and paid were so expended by the college."

On the other hand, as we have stated, the Circuit Courts for the Second and Eighth Circuits hold that similar pledges are not deductible but they are not in accord in their reasoning.

The decision in the Eighth Circuit seems to be on the ground that the consideration must move to the decedent, and that there can be no deduction unless his estate is augmented by such consideration.

In *Glaser v. Commissioner*, 69 Fed. (2d) 254 this Court denied as a deduction a pledge to a charitable institution known as "Shelter Home" in the sum of $250,000.00. The Board of Tax Appeals (27 B.T.A. 313) had already denied the deduction on the ground that there was no binding contract. The Circuit Court, however, instead of affirming the case on this ground, held that regardless whether it was binding, it could not be deducted as a claim against the estate. The Court based its opinion on a dictum of Judge Hickenlooper of the Circuit Court of Appeals for the Sixth Circuit in the case of *Latty v. Commissioner*, 62 Fed. (2d) 952, 954 to the effect that the words "contracted bona fide and for a fair consideration in money or money's worth" must be construed to evidence an intent on the part of Congress to permit the deduction of claims only to the extent that such claims were contracted for a consideration, which at the time either augmented the estate of the decedent, granted to him some right or privilege he did not possess before, or operated to discharge a then existing claim, as for breach of contract or personal injury. The Sixth Circuit Court of Appeals in deciding the present case recognizes that this was a mere dictum by Judge Hickenlooper and clearly holds that there is no requirement in the statute that the consideration must move to the decedent (R. p. 83). (92 Fed. 2nd at 670.)

The decisions in the Second Circuit, on the other hand, are on the ground that Congress intended this section to apply to financial bargains only and intended pledges to be deducted

under Section 303(a) (3). This Court admits that the consideration need not be received by the decedent.

In *Porter v. Commissioner*, 60 Fed. (2d) 673, (affirmed 288 U. S. 436 without discussing this point), this Court affirmed the Board's ruling (supra) that the pledge to Princeton University was not deductible under Section 301(a) (1) but allowed it to be deducted as a transfer. This ruling was followed in *Bretzfelder v. Commissioner*, 86 Fed. (2d) 713, and *Lockwood v. McGowan*, 87 Fed. (2d) 713, without discussing the point.

The Circuit Court of Appeals for the Sixth Circuit in the present case refuses to follow the basis of the rulings of the Circuit Courts of Appeal for the Second and Eighth Circuits in the *Porter* and *Glaser Cases*, respectively. It specifically holds that the Section is not limited to financial bargains, and that the consideration need not augment the decedent's estate. The Court admits that the obligations are binding on the estate, and are supported by consideration. It then holds that to give any meaning to the words, there must be more than merely such consideration as is sufficient in the law to support a promise; that it must be more than "fair consideration," and that the language of the 1926 Act must be given its plain and ordinary meaning. Without any further elaboration on what this plain and ordinary meaning is, it then states that, measured by the precise tests of the statute, these promised donations are but gifts, and there is no full and adequate consideration in money's worth. On the other hand, the Court affirmed the Board of Tax Appeals ruling allowing as deductions other pledges contingent upon similar sums being contributed by others. (R. p. 81; 92 Fed. (2d) at 669, 670.) The effect of its decision is to return to the distinction laid down by the Board in the *Porter Case* (Supra, p. 18).

Whether or not Mrs. Taft intended this fund as a gift to the University is immaterial. The law of Ohio holds that promised donations of this sort are legally binding obligations.

By calling them gifts, the Court has really attempted to avoid the question in dispute, and is inconsistent with its earlier finding that there was consideration. We submit that the analysis of these words which we give at the beginning of this argument shows that this consideration does come within the plain and ordinary meaning of the words; and that the ruling of the Third Circuit in the *Turner* and *Bryn Mawr Cases* should be sustained in the present case.

B. The execution of this binding pledge was a transfer to a charitable corporation deductible under Section 303(a) (3) of the Revenue Act of 1926.

Section 303(a) (3) of the Revenue Act of 1926 permits the deduction of transfers to charitable and educational corporations, as well as bequests, legacies, and devises to such corporations. It is respectfully submitted that the act of entering into a binding contract to pay money is a "transfer" within the meaning of the estate tax act. It is admitted that the University of Cincinnati would fall within the terms of the deductions allowed, if this had been a bequest to the University. Of course, in the ordinary case the question does not arise, whether the entering into an obligation before death, to be executed after death, is a transfer, because whether it is or not, the obligation itself can be deducted. The word "transfer" is frequently used throughout the estate tax law, and in many cases it includes, besides an actual transfer of physical possession prior to death, the execution of a document such as a trust deed or contract to complete the actual transfer at a later date, perhaps subsequent to death. The word "transfer" certainly includes the execution of a declaration of trust retaining a life interest in the donor, the transfer to be completed at his death.

Congress and the Commissioner of Internal Revenue have both attempted to give to the word "transfer" as broad a meaning as possible; certainly it should include the execution

of a binding agreement to pay money, which the executor must carry out under the laws of the state where made. If, for instance, a man approaching death contracted with a jeweler to buy and have delivered to his wife an expensive piece of jewelry and then died before the bill was paid or the jewelry delivered, the Government would have to allow the deduction of the debt to the jeweler but it would certainly and rightfully claim that there was a transfer in contemplation of death, although the only act of the decedent was the entering into a contract with the jeweler. The effect of the contract was to decrease the net estate of the testator, and it has all the characteristics of a transfer. Transfers may be made in many direct and indirect ways, but if the general effect is to decrease the decedent's estate, the transaction falls within the usual definition of a "transfer." The transfer of money to charitable institutions whether prior to death or by will is expressly deductible.

This contention is, as we have already pointed out, fully supported by *Porter v. Commissioner*, 60 Fed. (2d) 673, the case of the pledge of the memorial window to Princeton University. The decision of the Circuit Court of Appeals for the Second Circuit in that case was affirmed by the Supreme Court (288 U. S. 436) without, however, discussing the question of the deductibility of the pledge.

The later *Bretzfelder* and *Lockwood Cases* approve the *Porter Case*, although in the *Bretzfelder Case* the Court refused to allow the pledge to be deducted as a transfer because there was no proof that the pledgees were charitable corporations within the meaning of the statute.

In *Turner v. Commissioner*, 85 Fed. (2d) 919, the Circuit Court of Appeals for the Third Circuit sustained the deductibility of a pledge on the alternative ground that it was a transfer. There were two dissents to the majority opinion of the Board of Tax Appeals (31 B.T.A. 446) in this case which were in part on the ground that the pledge in question was covered by the word "transfer" in Section 303(a) (3).

In the case of *Commissioner v. Bryn Mawr Trust Co.*, 87 Fed. (2d) 607, this same Court also considered the question whether a pledge to St. Joseph's College was a transfer, and while reaching no definite conclusion because it was unnecessary, the Court stated that it knew of no reason why the rule of the *Porter* and *Turner Cases* was not applicable.

The only Circuit Court case aside from the present case that has refused to allow the deduction of such pledges as transfers is the *Glaser Case* in the Eighth Circuit. While the Court in that case (69 Fed. 2d at p. 256 bottom) seemed to feel that the Second Circuit had not considered the question very fully, its holding was merely that the claimed obligation in that case could not by any reasonable persuasion be brought within Section 303(a) (3). This ruling was correct because the promise to provide funds for the Shelter Home was certainly not binding on the pledgor. All that the pledgor had done was to leave a memorandum that he intended to change his will. The Board of Tax Appeals (27 B.T.A. 313) had held the claim not deductible on the same ground.

The Circuit Court of Appeals for the Sixth Circuit in the present case, in holding that Mrs. Taft's agreement to transfer this fund to the University did not amount to a transfer under Section 303(a) (3), finds help in the fact that the 1918 Act in the same environment used the word "gifts," while the 1926 Act used the word "transfers" (R. p. 82). It seems to us that this change strengthens our case rather than weakens it, "transfers" is certainly a broader word than "gifts." We agree that no gift had taken place prior to Mrs. Taft's death, but a valuable right enforceable against her and her estate had certainly been transferred. We are not attempting, as suggested by the Court, to use any doctrine of relation back. This transfer took place at the time the University accepted the offer.

The contract here under consideration, made by Mrs. Taft with the University, was binding, and incurred bona fide and for an adequate and full consideration in money or money's

worth. We respectfully submit, therefore, that it created in the University a claim against the estate, which was properly deductible under Section 303(a) (1), and also that the creation of this legal obligation against Mrs. Taft, also binding on the estate, was a transfer which was properly deductible under Section 303(a) (3).

II

Additional reasons why the other obligations are deductible as claims against the estate, not applicable to the indebtedness to the University for the Charles Phelps Taft Memorial Fund.

The other three obligations, namely, the agreement to pay $10,000.00 toward the salary of a director of art, the agreement to pay the salaries of two musicians, and the agreement to pay the salary of Mr. Kelley, are likewise deductible as claims for an adequate and full consideration in money or money's worth, or as transfers to charitable corporations for the same reasons as are set forth above. There are also additional reasons why these obligations are deductible as claims under Section 303(a) (1) which are not applicable to the agreement to establish the Charles Phelps Taft Memorial Fund.

In each of these cases the charitable corporation as consideration for the payment, agreed to employ men at salaries equivalent to the amounts which Mrs. Taft offered to pay, to do things which she desired to be done. In none of these cases would the charitable corporation have employed the men except for Mrs. Taft's promise, although in the case of the agreement to provide Mr. Kelly's salary, the Board found (R. p. 31) that it did not appear that Mr. Kelly's employment was in consideration of the decedent's promise. We assigned this finding as error in the petition for review to the Circuit Court, and also assigned this finding as error in this brief. Mr. Herbert G. French, a Director of the University, testified that the Uni-

versity would not have employed Mr. Kelly if Mrs. Taft had not agreed to pay his salary (R. p. 53, last paragraph), and there is no testimony to the contrary whatsoever.

If Mrs. Taft had made a direct agreement with these men to pay their salaries in return for this work which she desired them to do, there would have been no question but the amount would have been deductible. It seems to us that the mere fact that the charitable corporations were to employ them, and were also benefited by their services, does not change the situation.

Both the Board of Tax Appeals and the United States Circuit Court of Appeals denied these claims on the ground that they were not made in consideration of money promises of others within the ruling of the *Wade Case*, but it seems to us that they are in fact stronger cases for allowing the claim than the case of pledges in reliance on other pledges, which were approved by the Board of Tax Appeals in the *Wade Case* and by the United States Circuit Court of Appeals in the case of *Commissioner v. Taft, Executor*, (R. 82; 92 Fed. (2d) at 670) heard by the Circuit Court at the same time that the present case was heard, and which is covered by the same opinion. The charitable corporation was required to pay out money for services which were clearly adequate and full consideration in money or money's worth, besides the fact that Mrs. Taft was having things done which she desired to be done.

CONCLUSION

We, therefore, respectfully submit that the petition for certiorari should be granted, because the case is one of great public and general interest, in which the lower courts of the United States are in conflict; and that the conflict of authority which exists should be resolved in favor of the Petitioner.

Respectfully submitted,

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APPENDIX

Section 7916 of the Ohio General Code, reads as follows:

"For the further endowment, maintenance and aid of any such university, college or institution heretofore or hereafter founded, the board of directors thereof, in the name and in behalf of such municipal corporation may accept and take as trustee and in trust for the purposes aforesaid any estate, property or funds which may have been or may be lawfully transferred to the municipal corporation for such use by any person, persons or body corporate having them, or any annuity or endowment in the nature of income which may be covenanted or pledged to the municipal corporation, towards such use by any person, persons or body corporate. Any person, persons or body corporate having and holding any estate, property or funds in trust or applicable for the promotion of education, or the advancement of any of the arts or sciences, may convey, assign and deliver these to such municipal corporation as trustee in his, their or its place, or covenant or pledge its income or any part thereof to it. Such estate, property, funds or income shall be held and applied by such municipal corporation in trust for the further endowment, maintenance and aid of such university, college or institution, in accordance nevertheless with the terms and true intent of any trust or condition upon which they originally were given or held."

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 746

ROBERT A. TAFT, EXECUTOR OF THE ESTATE OF ANNA S. TAFT, DECEASED,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE PETITIONER

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One opinion was delivered by the United States Board of Tax Appeals and was written by John M. Sternhagen. It appears on page 19 of the record and is reported in 33 B.T.A. 671. The opinion of the United States Circuit Court of Appeals for the Sixth Circuit (Circuit Judges Hicks and Simons, and Nevin, District Judge, Judge Simons writing) was filed November 2, 1937, and appears at page 72 of the record. It is reported in 92 Fed. (2d) 667.

JURISDICTION

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c 229, 43 Stat. 938, 28 U.S.C.A. 347.

The judgment of the United States Circuit Court of Appeals was entered on November 2, 1937. The petition for a writ of certiorari was filed February 1, 1938, and was granted March 7, 1938.

QUESTIONS PRESENTED

The questions presented by this Petition are as follows:

1. Whether a promise to pay a sum of money to a corporation organized for charitable and educational purposes, accepted by such corporation and legally binding on the promisor, is a claim incurred or contracted *bona fide* and for an adequate and full consideration in money or money's worth, within the meaning of Section 303 (a) (1) of the Revenue Act of 1926, so that the amount due under such promise at the time of promisor's death is deductible from her gross estate in determining the net estate subject to estate tax.

2. Whether a promise to pay a sum of money to a corporation organized for charitable and educational purposes, accepted by such corporation and legally binding on the promisor, and in reliance upon which and in accordance with the terms of which promise the charitable corporation incurs an obligation to pay an equivalent sum of money to a third party for services to be rendered by such third party, is a claim incurred or contracted *bona fide* for an adequate and full consideration in money or money's worth, within the meaning of said Section 303 (a) (1) of said Act, so that the amount due under such promise at the time of the promisor's death is deductible from her gross estate in determining the net estate subject to estate tax.

3. Whether a promise to pay a sum of money to a corporation organized for charitable and educational purposes, accepted by such corporation and legally binding on the promisor, is a transfer to or for the use of a corporation organized and operated exclusively for religious, charitable, scientific, literary or educational purposes including the encouragement of art, within the meaning of Section 303(a) (3) of the Revenue Act of 1926, so that the amount remaining due under such promise at the time of the promisor's death is deductible from the amount of her gross estate in determining her estate tax.

STATUTES

The Statutes involved in this case are the following portions of Section 303(a) of the Revenue Act of 1926, in effect on January 31, 1931:

> "Sec. 303. For the purpose of the tax the value of the net estate shall be determined—
>
> "(a) In the case of a resident, by deducting from the value of the gross estate—
>
> "(1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages upon, or any indebtedness in respect to, property * * * to the extent that such claims, mortgages, or indebtedness were incurred or contracted bona fide and for an adequate and full consideration in money or money's worth.
>
> * * * * *
>
> "(3) The amount of all bequests, legacies, devises, or transfers, to or for the use of the United States, any State, Territory, and political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual * * *."

STATEMENT OF CASE

The Petitioner is executor of the estate of Anna S. Taft, who died on January 31, 1931, a resident of Cincinnati, Ohio. The Petitioner, in filing the Federal Estate Tax Return for her estate, claimed as deductions for the purpose of determining the net estate, subject to estate tax under the Revenue Act of 1926, the amounts owing at her death on the following contractual obligations which she had entered into prior to her death:

	Amount Owed At Death
1. A contract with the University of Cincinnati to establish a fund at the University to be known as the "Charles Phelps Taft Memorial Fund"	$2,000,000.00
2. A contract with the Cincinnati Institute of Fine Arts to provide it with funds to employ two additional men in the Cincinnati Symphony Orchestra for the year 1930-31, if the Orchestra would employ such additional men	3,920.00
3. A contract with the Cincinnati Institute of Fine Arts to contribute $10,000.00 per annum towards the salary of a director of art for the Institute if the Institute would employ such director	10,000.00
4. A contract with the University of Cincinnati to provide it with funds to pay the salary of Thomas Kelly if the University would employ Kelly as a professor to give a course in musical appreciation	1,500.00
Total	$2,015,420.00

The Commissioner of Internal Revenue disallowed these obligations as deductions, and both the Board of Tax Appeals

and the United States Circuit Court for the Sixth Circuit affirmed the disallowance.

The facts concerning the entering into of these obligations are as follows:

1. The Contract with the University of Cincinnati to Establish Charles Phelps Taft Memorial Fund.

On May 30, 1930, Mrs. Taft addressed a letter to the Board of Directors of the University of Cincinnati (Stip. 28, R. pp. 44-46) reading as follows:

"Cincinnati, Ohio, May 3, 1930.

To the Board of Directors of the
University of Cincinnati, Cincinnati, Ohio.

Gentlemen: I desire to establish a fund to be known as the Charles Phelps Taft Memorial Fund, to be used to assist, maintain and endow the study and teaching of 'The Humanities' in the College of Liberal Arts and the Graduate School of the University of Cincinnati. For the present I desire to have this fund administered by a Board of Trustees, consisting of Louise Taft Semple, William T. Semple, Robert A. Taft, Herbert G. French and myself, and I will make available for them during the ensuing year the sum of Fifty Thousand Dollars ($50,000), during the following year the sum of Seventy-five Thousand Dollars ($75,000) and in each year thereafter the sum of One Hundred Thousand Dollars ($100,000), or such other income as may be derived from a fund of Two Million Dollars ($2,000,000) which I will ultimately arrange to transfer to such Trustees. Pending the complete transfer of the principal of this fund, I will guarantee all obligations which the Trustees may assume within the limits of the income above set out. The Trustees shall have a wide discretion in defining the term 'The Humanities' and the purposes for which the income shall be used, but no expenditure shall be made by the Board of Trustees except in accordance with plans prepared within the College of Liberal Arts and the Gradu-

ate School and approved by the Board of Directors of the University.

I establish this fund as a memorial to my husband, Charles Phelps Taft, whose interest in the advance of culture and art included an especial interest in the progress of the University of Cincinnati, and a real enthusiasm for those studies which relate rather to the improvement of the mind than to physical and material betterment.

It is my belief that the University of Cincinnati is one of our most powerful agencies for strengthening the intellectual and spiritual values already so highly developed in Cincinnati. I realize that this particular gift is confined to one aspect of that development, but the activities of the University are so varied that it is impossible for any one person to cover the entire field, or even to cover completely one phase of the subject. My particular interest is in bringing about a concentration of interest upon that group of ideas which is generally known as 'The Humanities,' hoping that others may be inspired to join in the same work or other work of the University. In referring to 'The Humanities,' I include particularly literature and language, philosophy, and history, and with these I have also in mind economics and mathematics. Without wishing to lessen, or to regard in any way lightly, the great efforts being put forth for the material and physical betterment of mankind, to which great funds are everywhere being devoted, I believe that there is some danger of a lack of emphasis on the value of thought and conduct and character, and I have therefore confined my gift to 'The Humanities,' which are concerned particularly with the development of ideas, of thought and of character.

I should be obliged if you would let me know if the establishment of the Charles Phelps Taft Memorial Fund is acceptable to your Board.

Sincerely yours,

ANNIE SINTON TAFT."

This offer was formally accepted by the Board of Directors of the University of Cincinnati by resolution adopted May 6, 1930 (Stip. Exhibit O, R. pp. 60, 61).

In accordance with this agreement, Mrs. Taft paid to the Trustees named in her letter, on September 30, 1930, the sum of $50,000.00 (R. p. 48). On December 10, 1930, the Trustees appropriated $33,800.00, subject to the approval of the Board of Directors of the University (Stip. 29, R. p. 46 Exhibit O, R. pp. 62-68). On January 6, 1931, the Board of Directors of the University approved the expenditures recommended by the Trustees (Stip 30, R. p. 46 Exhibit P, R. p. 68). Prior to January 31, 1931, the date of Mrs. Taft's death, the books of the University showed expenditures out of said appropriation amounting to $11,753.83 (R. p. 52).

Since Mrs. Taft's death, Petitioner as executor of her estate, up to the time of the hearing before the Board of Tax Appeals, had paid to the Trustees the total sum of $249,750.00, as interest on the principal of the fund, such interest being calculated at five per cent during the first few years, and three and one-half per cent during the latter years (R. p. 49).

The University is a municipal university under the laws of the State of Ohio, owned by the City of Cincinnati, governed by a Board of Directors appointed by the Mayor of the City, and without separate corporate existence from the City. Its work is purely educational, and no profit inures to any individual (Stip. 27, R. p. 44).

2. The Contract with The Cincinnati Institute of Fine Arts to Provide it with Funds to Employ Two Additional Men in the Cincinnati Symphony Orchestra.

The Cincinnati Institute of Fine Arts is a charitable corporation under the laws of Ohio, organized for the purpose of maintaining a symphony orchestra, music schools and art museums, and no profit inures to any individual. Mrs. Taft

and her husband, Charles P. Taft, by deed of gift dated May 21, 1927, conveyed to it their house and collection of pictures and other works of art in the house, together with the sum of $1,000,000.00. This deed of gift was conditioned on the citizens of Cincinnati contributing a fund of $2,500,000.00 to the Institute to be used primarily for the support of the Cincinnati Symphony Orchestra, to which Mrs. Taft had theretofore contributed as much as $200,000.00 per year (Stip. 19, R. p. 43; Exhibit I, the original of which is filed with the record in this case; see R. p. 53). The campaign was successful and the Institute took over the operation of the orchestra for the orchestra year 1929-30. The Institute found that it would be necessary to reduce the size of the orchestra, as it did not have sufficient income to operate it. The director of the orchestra desired to retain two more men than the Institute would allow. Thereupon Mrs. Taft promised that if the Institute would retain two men, whom the director desired retained, she would pay to the Institute the amount of their salaries for the two years covered by the contracts of employment then being made. Relying on this promise, the Institute re-engaged these two men. Mrs. Taft paid the Institute $3,920.00 prior to her death, the amount of their salaries for the first year, and the Petitioner as her executor, paid the same amount to the Institute after her death to provide funds to pay their salaries for the second year (R. p. 47). The Institute would not have re-employed these men except for Mrs. Taft's agreement to pay the amount of their salaries (R. pp. 50, 51).

3. The Contract with The Cincinnati Institute of Fine Arts to Contribute $10,000.00 per annum towards the Salary of a Director of Art for the Institute.

On June 3, 1929, Mrs. Taft addressed a letter to the Institute stating that if it would employ a director of art, she would contribute $10,000.00 per annum towards his salary (Stip. 22,

R. p. 43). Relying on this letter, the Institute engaged Mr. Walter H. Siple, then Assistant Director of the Fogg Art Museum in Cambridge, Massachusetts, at a salary of $10,000.00 per year. The Institute did not have sufficient funds to employ a director at such salary, and would not have done so except for Mrs. Taft's agreement (R. p. 51). The only connection the Institute had with art at that time was the Taft Collection in Mrs. Taft's residence, over which she retained control during her life, under the deed of gift of May 21, 1927. (Exhibit I filed herewith). As a part of Mr. Siple's duties was to act as Curator of this collection, Mrs. Taft, by his employment, secured his services to take care of this art collection during the time the collection was in her possession (R. p. 51). Mrs. Taft paid this sum to the Institute for one and one-half years prior to her death, and the Petitioner, as her Executor, paid this sum for one year after her death (R. pp. 47, 48).

4. The Contract with University of Cincinnati to Provide Funds to Pay the Salary of Mr. Thomas James Kelly.

In the spring of 1930 Mrs. Taft agreed with the University of Cincinnati that if it would engage Mr. Thomas James Kelly as a professor to give a course in musical appreciation during the academic year 1930-31, she would pay to the University the amount of his salary. She had made similar arrangements for some years prior to that time. The University employed Mr. Kelly, but would have not done so, except for her agreement to pay to the University the amount of his salary (R. p. 52). $1,500.00 was owed at the time of her death, which the Petitioner, as her executor, has since paid to the University (R. p. 49).

SPECIFICATION OF ERRORS

We submit that the Circuit Court of Appeals for the Sixth Circuit erred:

1. In failing to find and hold that Mrs. Taft's promises to pay the above-mentioned sums of money to the University of

Cincinnati, and to the Cincinnati Institute of Fine Arts were for adequate and full consideration in money or money's worth within the meaning of Section 303(a) (1) of the Revenue Act of 1926, and hence deductible as claims against her estate in determining the net estate subject to estate tax.

2. In failing to find and hold that Mrs. Taft's promises to transfer these sums of money to the above-mentioned charitable corporations were transfers to such charitable corporations within the meaning of Section 303(a) (3) of the Revenue Act of 1926, and hence that the amounts owed under such promises at the date of Mrs. Taft's death were deductible from her gross estate in determining the net estate subject to estate tax.

3. In failing to find and hold that as a matter of evidence the employment of Professor Kelly by the University of Cincinnati was in consideration of Mrs. Taft's promise to pay to the University the amount of his salary.

SUMMARY OF ARGUMENT

I. The sum of $2,000,000.00 owed to the University of Cincinnati to establish the Charles Phelps Taft Memorial Fund is deductible for estate tax purposes either as a claim against the estate or as a transfer.

A. This indebtedness is deductible as a claim against the estate under Section 303(a) (1) of the Revenue Act of 1926.

1. That this indebtedness is a legally binding obligation of the estate under the laws of Ohio, and was incurred bona fide has not been challenged.

2. The indebtedness was incurred for an adequate and full consideration in money or money's worth within the meaning of Section 303(a) (1).

The Board of Tax Appeals' Distinctions.

The Circuit Courts of Appeals' Decisions.

B. The execution of this binding pledge was a transfer to a charitable corporation deductible under Section 303(a) (3) of the Revenue Act of 1926.

1. The making of the contract was a transfer.
2. The performance of the contract was a transfer.
3. The Statute should be construed liberally in favor of Petitioner.

II. Additional Reasons why the other obligations are deductible as claims against the estate, not applicable to the indebtedness to the University for the Charles Phelps Taft Memorial Fund.

ARGUMENT

I

The sum of $2,000,000.00 owed to the University of Cincinnati to establish the Charles Phelps Taft Memorial Fund is deductible for estate tax purposes either as a claim against the estate or as a transfer.

A. This indebtedness is deductible as a claim against the estate under Section 303(a) (1).

1. *That this indebtedness is a legally binding obligation of the estate under the laws of Ohio, and was incurred bona fide has not been challenged.*

The United States Board of Tax Appeals and the United States Circuit Court of Appeals agree that this promise to establish the Charles Phelps Taft Memorial Fund became a binding obligation on Mrs. Taft upon acceptance by the University, and the binding obligation of your Petitioner, as her Executor, upon her death, and that this obligation was entered into *bona fide*. The Board stated (R. p. 24):

"(a) There is no suggestion that the $2,000,000 was not a valid claim against the estate or that it was not

> incurred or contracted bona fide, The controversy turns upon whether it was 'for an adequate and full consideration in money or money's worth.' "

The Circuit Court said in its opinion (R. p. 74):

> "That the obligations incurred by the decedent were enforcible under Ohio law, or that they were incurred in good faith, is not challenged."

We wish to emphasize the fact, however, that the Supreme Court of the State of Ohio goes farther than the courts of other states in holding pledges to charitable institutions binding on the pledgor. It not only holds that such pledges are binding if given in consideration of the promises of others, or if the pledges are relied upon by the charitable corporation and part of the money spent, but in the cases of pledges to universities, the Supreme Court of Ohio holds that the accomplishment of the purposes for which pledge was made and the University was formed is sufficient consideration. *Irwin Administrator v. Lombard University*, 56 O.S. 9. The syllabus in this case reads as follows:

> "The consideration for a promissory note executed to an incorporated college is the accomplishment of the purposes for which it is incorporated and in whose aid the note is executed; and such consideration is sufficient."

A summary of the Ohio cases prior to the *Lombard University Case* is given in the appendix.

It should also be pointed out that by Section 7916* of the General Code of Ohio, municipal universities in Ohio, of which the University of Cincinnati is one, are specifically authorized to accept trust funds like the Charles Phelps Taft Memorial Fund.

In effect the consideration is the assumption by the University of the obligation to expend the income of the fund for certain stated purposes.

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*See Appendix, page 36.

The only question, therefore, is whether this obligation to establish the Charles Phelps Taft Memorial Fund was incurred "for an adequate and full consideration in money or money's worth."

2. *The Indebtedness was Incurred for an Adequate Consideration in Money or Money's Worth.*

Prior to the Revenue Act of 1924, there was no provision limiting the deductibility of claims by any requirement as to the kind or amount of consideration. In that Act, however, a provision was added in Section 303(a) (1) which is similar to the provision in the 1926 Act, except that the word "fair" was used instead of "adequate and full." The report of the Ways and Means Committee shows that this limitation was inserted in the 1924 Act to make it conform with Section 302(c), (d) and (e) of the Act with regard to transfers made for less than full consideration. H. Rep. No. 179, 68th Congress, 1st session, p. 28.

The purpose of inserting this qualification both in this section of the Act and in other sections was to prevent tax avoidance. As was stated in *United States v. Mitchell*, 74 Fed. (2d) 571, discussed below, these amendments were inserted to avoid the successful presentation of swollen or fictitious claims. Before this provision was inserted, claims against an estate might be deducted whenever they were supported by any legal consideration, even though such claims had been deliberately created for the purpose of securing a deduction. Thus in any state where a sealed instrument imported consideration, an agreement to transfer assets under seal would have been deductible. Similarly, a man might make a contract with his children to transfer property for much less than its real value, thus creating a claim by his children against the estate.

Obviously this purpose could not apply to the deductibility of binding pledges made to political subdivisions for

public purposes, or to religious, charitable, scientific, literary and educational corporations. Transfers to such corporations, whether made prior to death in contemplation of death, or by will, are expressly deductible under Section 303(a) (3). If a man wishes to make such a bequest and avoid the estate tax thereon, he is expressly authorized and encouraged to do so.

The attempt to apply Section 303(a) (1) to exclude charitable pledges has this strange effect. A man may give property before his death to such an organization and thereby decrease the total amount of his estate subject to estate tax, even though the transfer is made in contemplation of death. He may leave such property in his will and the amount thereof is deducted before determining the estate tax. But according to the Government's claim, if he makes a binding promise to turn over the property but dies prior to the actual delivery of the assets, the assets are a part of his net estate subject to estate tax, even though his executor is legally required to and does carry out the promise. Surely Congress would not deliberately intend such a ridiculous result.

The important words of the section are really the words "bona fide," indicating an intention to disallow deductions arising from claims entered into in an attempt to avoid the estate tax. It is obvious that the purpose of the provision does not in any sense apply to charitable pledges which are legally binding under the laws of the state where made.

The same conclusion must be reached if we analyze the actual words used in this section. The phrase "adequate and full consideration in money or money's worth" is redundant. Webster's New International Dictionary, Second Edition, defines "adequate" as "legally sufficient; such as is lawfully and reasonably sufficient." One of the definitions of "full" is "adequate." It is also defined as "complete or not wanting in any part." The same dictionary defines "money's worth" as

"something worth money; a fair or full equivalent for the money paid."

From these definitions, we submit that the phrase means little more than a substantial consideration not obviously inadequate. It would not be met by a seal, which, after all, is not consideration at all, but merely a substitute for consideration under the law of some states. It would not be met by the vague phrase "in consideration of love and affection," because it is obvious that "love and affection" is not a consideration at all and has never been considered as such. It is also clear that if a man agrees to transfer a building worth $100,000.00 to his son for $5,000.00, the requirement of "adequate and full" consideration is not met. But we submit that when the consideration is the promise of other persons to contribute money, the promise of the university to undertake certain work, the agreement of an institution to employ men and do various other things which they would otherwise not do, there is no reason for the courts to question the adequateness or fullness of the consideration. Obviously the person making the pledge considered that the consideration was sufficient for the amount he was agreeing to give. Thus in the present case it is clear that the employment of additional professors, the purchase of additional books, the granting of aid to worthy students by the University of Cincinnati for all time to come was considered by Mrs. Taft to be worth the sum of $2,000,000.00. It is suggested that there is a limitation through the use of the words "money's worth." We respectfully submit that this really adds nothing to the requirement of adequate and full consideration. "Money's worth" may be the performance of charitable acts just as well as the transfer of property.

The respondent argued in this and other cases that this consideration must be received by the decedent and augment his estate, though this requirement was stricken from Article 36,

Regulation 70 (1929 ed), by T.D. 4322 (X-2 C.B. 420) dated September 18, 1931. There is no justification for such a construction. If Congress had intended that the consideration must actually be received by the decedent, it would have so provided (as it did in Section 302(i) of the 1926 Act). So to construe the section would make necessary the disallowance of accommodation endorsements and guarantees of accounts actually enforced against the executor. Such claims have been held to be deductible by the Circuit Courts of Appeals in *United States v. Mitchell*, 74 Fed. (2d) 571, and *Carney v. Benz*, 90 Fed. (2d) 747, 749. It would also eliminate most claims arising from personal services, which are allowed without question. In the case of *Commissioner v. Kelly's Estate*, 84 Fed. (2d) 958, certiorari denied 299 U.S. 603, deduction of a note given in consideration of the cancellation of a similar note owed by the estate of the decedent's father was allowed to be deducted in spite of the fact that the decedent received no consideration. The Circuit Court in the present case agrees with us that the consideration need not be received by the decedent or augment his estate (R. 77).

It was stated by the Court of Appeals for the Second Circuit, in *Porter v. Commissioner*, 60 Fed. (2d) 673, 675, that this section is limited to financial bargains, but certainly there is nothing in the meaning of the words to require such a restriction. The Circuit Court in the present case holds that there is no such restriction (R. 78).

The words do not mean that the consideration paid or rendered by the promisee must necessarily be such consideration as an ordinary, prudent business man would have required under similar circumstances. There is nothing in the section about ordinary, prudent business men. A bad bargain, entered into without intention of avoiding the tax, should be just as binding and just as deductible as a good bargain. We submit that if a decedent enters into a transaction which he knows

is binding upon himself and his estate, and in which he considers that the other party to the bargain is doing or undertaking to do something worth the money he contracts to give, then there is full and adequate consideration, whether the consideration moves to him or not, whether other people think it is adequate or not, providing it is not done for the purpose of avoiding the estate tax.

BOARD OF TAX APPEALS DISTINCTIONS

The Board of Tax Appeals in *Wade v. Commissioner*, 21 B.T.A. 839, which was the leading case on this question until the Circuit Court of Appeals cases discussed below, held that the pledges made by Mr. Wade during his lifetime were deductible. One of these pledges was represented by a note for $20,000.00, bearing interest at five per cent, payable at any time, but in any event, upon his death. In reliance upon this promise, the pledgee, a museum, included the interest in its budget in the years preceding Mr. Wade's death. This pledge was secured in a campaign in which other persons also made pledges. The Board held that this consideration of promises by others was adequate and full consideration for money or money's worth, and allowed the pledge to be deducted as a claim.

In *Porter v. Commissioner*, 23 B.T.A. 1016, however, the Board limited the applicability of the *Wade Case* to pledges made in consideration of other pledges. In this case the decedent made a subscription to Princeton University to provide funds for the construction of a memorial window in the chapel there. A balance of $5,000.00 was still due on the pledge at his death, but the University had contracted for and commenced construction of the window prior to his death. The Board held that there was no proof of an adequate and full value in money or money's worth and refused to allow the deduction, distinguishing the *Wade Case* on the ground that

payments of money by other pledgors met this requirement. The executor also claimed this pledge was deductible as a transfer under Section 303(a) (3), but this claim was likewise denied. The Circuit Court of Appeals for the Second Circuit affirmed the Board on the first ground and reversed it on the second. (This decision is discussed below.) The Board has followed this theory in all cases coming before it since the *Porter Case*, including the present one.

CIRCUIT COURT OF APPEALS DECISIONS

The United States Circuit Courts of Appeals have not followed this line of distinction of the Board of Tax Appeals, and there is a square conflict in their decisions as to whether pledges are deductible.

The United States Circuit Court of Appeals for the Third Circuit has held, in two cases, that a binding pledge not made in consideration of other pledges is incurred for a full and adequate consideration in money or money's worth, and is deductible as a claim against the estate.

In *Turner v. Commissioner*, 85 Fed. (2d) 919, the decedent had pledged $1,000,000.00 to the Young Men's Christian Association for a building in Jerusalem. Two-thirds of the pledge was still owing at his death, and the Circuit Court of Appeals for the Third Circuit held this balance to be deductible as a claim against the estate. The Court stated that in its opinion the consideration connected with binding educational, charitable and religious gifts is money or money's worth, saying (p. 920):

> "Within the meaning of the statute, 'money's worth' does not mean money itself. The ultimate question on this phase of the case is what consideration may be regarded as money's worth. Must it be material, such physical things as may be bought and sold in the open market? Or, may it be religious, charitable, or educational considerations which in some cases are not only 'adequate and full,'

but are precious and priceless? We are told that 'a good name is rather to be chosen than great riches.' Consideration connected with educational, charitable, or religious gifts may not be money in a commercial sense, but it does constitute money's worth in a higher sense, just as the knowledge that others are contributing to charitable institutions constitutes adequate and full consideration for one's gift though, as a matter of fact, the giver does not receive a single material thing. Jeptha H. Wade, Jr., et al., v. Commissioner, 21 B.T.A. 339."

In this same Circuit, in *Commissioner v. Byrn Mawr Trust Co.*, 87 Fed. (2d) 607, this Circuit Court, with two Judges sitting who did not sit in the Turner case, held that an unpaid balance of a pledge to a University in the sum of $60,000.00 could be deducted. The Court gave careful consideration to the question as to whether the consideration was full and in money or money's worth. Its opinion on this question is as follows (p. 609):

"It remains, however, to consider whether the consideration was full and in money or money's worth. It is an elementary rule that a legal consideration may take the former either of a benefit to the promisor or of a detriment or loss to the promisee. As Mr. Justice Story said in Townsley v. Sumrall, 2 Pet. 170, 182, 7 L. Ed. 386: 'Damage to the promisee, constitutes as good a consideration as benefit to the promisor.' The consideration for the decedent's pledges here involved was of this latter character. Was this consideration full and in money or money's worth? We think the answer to this question must be in the affirmative. Assuming the consideration was the expenditure by the college of funds to carry out the objects contemplated by the decedent, it is clear that it was in money or money's worth since these expenditures were in money, and it can not be doubted that the consideration was full since all the funds subscribed and paid were so expended by the college."

On the other hand, as we have stated, the Circuit Courts for the Second and Eighth Circuits hold that similar pledges are not deductible but they are not in accord in their reasoning.

The decision of the Eighth Circuit seems to be on the ground that the consideration must move to the decedent, and that there can be no deduction unless his estate is augmented by such consideration.

In *Glaser v. Commissioner*, 69 Fed. (2d) 254 this Court denied as a deduction a pledge to a charitable institution known as "Shelter Home" in the sum of $250,000.00. The Board of Tax Appeals (27 B.T.A. 313) had already denied the deduction on the ground that there was no binding contract. The Circuit Court, however, instead of affirming the case on this ground, held that regardless whether it was binding, it could not be deducted as a claim against the estate. The Court based its opinion on a dictum of Judge Hickenlooper of the Circuit Court of Appeals for the Sixth Circuit in the case of *Latty v. Commissioner*, 62 Fed. (2d) 952, 954 to the effect that the words "contracted bona fide and for a fair consideration in money or money's worth" must be construed to evidence an intent on the part of Congress to permit the deduction of claims only to the extent that such claims were contracted for a consideration, which at the time either augmented the estate of the decedent, granted to him some right or privilege he did not possess before, or operated to discharge a then existing claim, as for breach of contract or personal injury. The Sixth Circuit Court of Appeals in deciding the present case recognizes that this was a mere dictum by Judge Hickenlooper and holds that there is no requirement in the statute that the consideration must move to the decedent (R. p. 77). (92 Fed. 2nd at 670.)

The decisions in the Second Circuit, on the other hand, are on the ground that Congress intended this section to apply to financial bargains only and intended pledges to be

deducted under Section 303(a) (3). This Court admits that the consideration need not be received by the decedent.

In *Porter v. Commissioner*, 60 Fed. (2d) 673, (affirmed 288 U.S. 436 without discussing this point), this Court affirmed the Board's ruling (supra, p. 17) that the pledge to Princeton University was not deductible under Section 301(a) (1) but allowed it to be deducted as a transfer. This ruling was followed in *Bretzfelder v. Commissioner*, 86 Fed. (2d) 713, and *Lockwood v. McGowan*, 86 Fed. (2d) 1005, without discussing the point.

The Circuit Court of Appeals for the Sixth Circuit in the present case refuses to follow the basis of the rulings of the Circuit Courts of Appeal for the Second and Eighth Circuits in the *Porter* and *Glaser Cases*, respectively. It specifically holds that the Section is not limited to financial bargains, and that the consideration need not augment the decedent's estate. The Court admits that the obligations are binding on the estate, and are supported by consideration. It then holds that to give any meaning to the words, there must be more than merely such consideration as is sufficient in the law to support a promise; that it must be more than "fair consideration," and that the language of the 1926 Act must be given its plain and ordinary meaning. Without any further elaboration on what this plain and ordinary meaning is, it then states that, measured by the precise tests of the statute, these promised donations are but gifts, and there is no full and adequate consideration in money's worth.

The Circuit Court of Appeals also affirmed the Board of Tax Appeals' ruling allowing as deductions other pledges made by Mrs. Taft as part of campaigns for pledges in *Commissioner v. Taft*, heard at the same time as the present case (R. p. 77; 92 Fed. (2d) at 669 and 670). The effect of its entire decision, therefore, is to return to the distinction

laid down by the Board in the *Porter Case*, supra, page 17. Both the Board and the Court held that the agreement by other pledgors to pay sums of money to charities was a consideration in money. No distinction was made between pledges made by Mrs. Taft, contingent on the pledge of a specific amount by others, and pledges made merely as a part of a general campaign. Thus, her pledge to the symphony orchestra for $125,000.00, conditioned on pledges by others to the Institute for $2,500,000.00, and her pledge of $22,500.00 to the Museum, conditioned on $40,000.00 being subscribed for the same purpose by others, were allowed as deductions (Findings III and IV of Board's Opinion, R. pp. 26 and 27), and pledges of $4,125.00 to Christ Church and $51,875.00 to the Community Chest (Findings VI and VII, R. pp. 27, 28) were also allowed, although Mrs. Taft imposed no conditions as part of her pledges in these instances.

It is, therefore, clear that the Court was of the opinion that the mere fact that the pledge was made as a part of a general campaign was sufficient to permit its deduction. There is no discussion as to whether the consideration for these pledges was full and adequate, and the only thing that the Court seemed concerned about was whether the consideration was for the money or money's worth. The fact that the other pledgors were required to pay money was sufficient to settle this question in their minds. We do not presume that their decision would have been any different if the other pledgors had agreed to perform services for the charity instead of giving it money.

We submit that the distinction made by the Board of Tax Appeals and the lower court in this case, is based on trivialities. The fact is that in neither case is the consideration "money"; in both cases the real consideration, under the law of Ohio is the attainment of the charitable purposes and this

is "money's worth." The Court in the *Bryn Mawr Trust Company Case,* 87 Fed. (2d) at 609, recognized that there was no distinction and held that both kinds of consideration were for money or money's worth.

We, therefore, submit that this Court should sustain the rulings of the Third Circuit in the *Turner* and *Bryn Mawr Cases,* and hold that this claim was for an adequate and full consideration in money or money's worth, and hence deductible under Section 303(a) (1) in determining the net estate subject to estate tax.

B. The execution of this binding pledge was a transfer to a charitable corporation deductible under Section 303(a) (3) of the Revenue Act of 1926.

Section 303(a) (3) of the Revenue Act of 1926 permits the deduction of bequests, legacies, devises or *transfers* to charitable and educational corporations. The history of this Section is as follows:

Section 403(a) (3) of the Revenue Act of 1918 provided:

> "The amount of all bequests, legacies, devises or *gifts* to or for the use of . . ." (Italics supplied.)

Section 403(a) (3) of the Revenue Act of 1921 provided:

> "The amount of all bequests, legacies, devises, or *transfers,* except bona fide sales for a fair consideration in money or money's worth, in contemplation of or intended to take effect in possession or enjoyment at or after the decedent's death, to or for the use of . . ." (Italics supplied.)

Section 303(a) (3) of the Revenue Act of 1924 is identical with Section 403(a) (3) of the Revenue Act of 1921.

Section 303(a) (3) of the Revenue Act of 1926 omits the phrase "except bona fide sales for a fair consideration in money or money's worth, in contemplation of or intended to

take effect in possession or enjoyment at or after the decedent's death," and adds a limitation as to the amount of the deduction, which is not material in this case.

1. The Making of the Contract was a Transfer

It is respectfully submitted that the act of entering into a binding contract to pay money is a "transfer" within the meaning of Section 303(a) (3) of the Revenue Act of 1926. It is admitted that the University of Cincinnati would fall within the terms of the deductions allowed, if this had been a bequest to the University. Of course, in the ordinary case the question does not arise, whether the entering into an obligation before death, to be executed after death, is a transfer, because whether it is or not, the obligation itself can be deducted. The word "transfer" is frequently used throughout the estate tax law, and in many cases it includes, besides an actual transfer of physical possession prior to death, the execution of a document such as a trust deed or contract to complete the actual transfer at a later date, even subsequent to death.

If a donor creates a trust reserving a life estate to himself, then providing for a life estate in his wife and a remainder to a charity coming within the exemption, the value of the remainder to the charity is deductible from his gross estate for estate tax purposes as a transfer to a charity, though the actual amount which the charity will receive is less certain than in the present case.

Congress and the Commissioner of Internal Revenue have both attempted to give to the word "transfer" as broad a meaning as possible for the purpose of stopping the avoidance of estate taxes. This Court has likewise generally recognized that it should be given a broad meaning. *Chase National Bank v. United States*, 278 U.S. 327.

In that case this Court, in sustaining the inclusion of life insurance policies in the gross estate under Section 402(f) where the insured has the power to change the beneficiaries, said (page 337):

> "Obviously, the word 'transfer' in the statute, or the privilege which may constitutionally be taxed, cannot be taken in such a restricted sense as to refer only to the passing of particular items of property directly from the decedent to the transferee. It must, we think, at least, include the transfer of property produced through expenditures by the decedent with the purpose, effected at his death, of having it pass to another. Section 402(c) taxes transfers made in contemplation of death. It would not, we assume, be seriously argued that its provisions could be evaded by the purchase by a decedent from a third person of property, a savings bank book for example, and its delivery by the seller directly to the intended beneficiary on the purchaser's death. . . ."

Certainly it should include the execution of a binding agreement to pay money, which the executor must carry out under the laws of the state where made. If, for instance, a man approaching death contracted with a jeweler to buy and have delivered to his wife an expensive piece of jewelry and then died before the bill was paid or the jewelry delivered, the Government would have to allow the deduction of the debt to the jeweler but it would certainly and rightfully claim that there was a transfer in contemplation of death, although the only act of the decedent was the entering into a contract with the jeweler. The effect of the contract was to decrease the net estate of the testator, and it has all the characteristics of a transfer. Transfers may be made in many direct and indirect ways, but if the general effect is to decrease the decedent's estate, the transaction falls within the usual definition of a "transfer."

This contention is, as we have already pointed out, fully supported by *Porter v. Commissioner*, 60 Fed. (2d) 673, the case of the pledge of the memorial window to Princeton University. The decision of the Circuit Court of Appeals for the Second Circuit in that case was affirmed by the Supreme Court (288 U.S. 436) without, however, discussing the question of the deductibility of the pledge.

The later *Bretzfelder* and *Lockwood Cases* approve the *Porter Case*, although in the *Bretzfelder Case* the Court refused to allow the pledge to be deducted as a transfer because there was no proof that the pledgees were charitable corporations within the meaning of the statute.

In *Turner v. Commissioner*, 85 Fed. (2d) 919, the Circuit Court of Appeals for the Third Circuit sustained the deductibility of a pledge on the alternative ground that it was a transfer. There were two dissents to the majority opinion of the Board of Tax Appeals (31 B.T.A. 446) in this case which were in part on the ground that the pledge was a "transfer" within the meaning of Section 303(a) (3).

In the case of *Commissioner v. Bryn Mawr Trust Co.*, 87 Fed. (2d) 607, this same Court also considered the question whether a pledge to St. Joseph's College was a transfer. While reaching no definite conclusion because it was unnecessary, the Court stated that it knew of no reason why the rule of the *Porter* and *Turner Cases* was not applicable.

The only Circuit Court case aside from the present case that has refused to allow the deduction of such pledges as transfers is the *Glaser Case* in the Eighth Circuit. While the Court in that case (69 Fed. 2d at p. 256 bottom) seemed to feel that the Second Circuit had not considered the question very fully, its holding was merely that the claimed obligation could not by any reasonable persuasion be brought within Section 303(a) (3). This ruling was correct because the promise to provide funds for the Shelter Home was cer-

tainly not binding on the pledgor. All that the pledgor had done was to leave a memorandum that he intended to change his will. The Board of Tax Appeals (27 B.T.A. 313) had held the claim not deductible on this latter ground.

The Circuit Court of Appeals for the Sixth Circuit in holding that Mrs. Taft's agreement to transfer this fund to the University did not amount to a transfer under Section 303(a)(3), finds help in the fact that the 1918 Act in the same environment used the word "gifts," while the 1926 Act used the word "transfers" (R. p. 76). It seems to us that this change strengthens our case rather than weakens it; "transfers" is certainly a broader word than "gifts." We agree that no gift had taken place prior to Mrs. Taft's death, but a valuable right enforceable against her and her estate had certainly been transferred.

2. *The Performance of the Contract of Pledge was a Transfer*

Section 303(a)(3) reads in part as follows:

> "Sec. 303. For the purpose of the tax the value of the net estate shall be determined—
>
> (a) In the case of a resident, by deducting from the value of the gross estate— * * * *
>
> (3) The amount of all bequests, legacies, devises, or *transfers* * * * *" (Italics supplied.)

There is no requirement that the transfer to be deductible must be completed prior to death, and no such requirement should be implied. If the decedent makes a legally binding contract to transfer certain property, and his executor completes the transfer after his death, because he has to, the transfer is one in fact made and brought about by the decedent.

In the case of *Smith, et al., Executors, v. Commissioner*, 78 Fed. (2d) 897, the decedent's will contained no charitable bequests. Following a will contest a compromise agreement was entered into among the contestants, which included certain

charitable bequests, and the will thus modified was probated. The Circuit Court held that the gifts passing to the charity under the compromise agreement were deductible from the gross estate. While the Circuit Court based its decision on the ground that under the local law the provisions of the agreement were deemed embodied in the will, the fact remains that the decedent had not made these bequests to the charities, and at the date of the decedent's death the charities did not even have any right in any property or assets of the decedent. It seems to us that this really amounted to a transfer of these assets of the decedent to the charity by operation of law.

3. The Statute should be construed liberally in favor of Petitioner

If there are any doubts as to whether this agreement constituted a transfer, these doubts should be resolved in favor of the Petitioner. Congress in providing this exemption evinced legislative policy to encourage charitable gifts by relieving them from taxation. The statute should be construed liberally to effectuate this purpose. *U. S. v. Provident Trust Company*, 291 U.S. 272, 285. See also *Old Colony Trust Company v. Commissioner*, 301 U.S. 379, at 383; *Helvering v. Bliss*, 293 U.S. 144, at 150 and 151; *Y.M.C.A. v. Davis*, 264 U.S. 47, at 50.

The contract here under consideration, made by Mrs. Taft with the University, was binding, and incurred bona fide and for an adequate and full consideration in money or money's worth. We respectfully submit that it created in the University a claim against the estate, which was properly deductible under Section 303(a) (1), and also that there was a transfer which was properly deductible under Section 303(a) (3).

II

Additional reasons why the other obligations are deductible as claims against the estate, not applicable to the indebtedness to the University for the Charles Phelps Taft Memorial Fund.

The other three obligations, namely, the agreement to pay $10,000.00 toward the salary of a director of art, the agreement to pay the salaries of two musicians, and the agreement to pay the salary of Mr. Kelly are likewise deductible as claims for an adequate and full consideration in money or money's worth, or as transfers to charitable corporations for the same reasons as are set forth above. Both the Board and the lower court likewise agree that these obligations were likewise incurred bona fide and were binding on Mrs. Taft and her executor.

There are also additional reasons why these obligations are deductible as claims under Section 303(a) (1) which are not applicable to the agreement to establish the Charles Phelps Taft Memorial Fund.

In each of these cases the charitable corporation as consideration for the payment, agreed to employ men at salaries equivalent to the amounts which Mrs. Taft offered to pay, to do things which she desired to be done. In none of these cases would the charitable corporation have employed the men except for Mrs. Taft's promise, although in the case of the agreement to provide Mr. Kelly's salary, the Board found (R. p. 31) that it did not appear that Mr. Kelly's employment was in consideration of the decedent's promise. We assigned this finding as error in the petition for review to the Circuit Court, and also assigned this finding as error in this brief. Mr. Herbert G. French, a Director of the University, testified that the University would not have employed Mr. Kelly if Mrs. Taft had

not agreed to pay his salary (R. p. 52, last paragraph), and there is no testimony to the contrary whatsoever.

If Mrs. Taft had made a direct agreement with these men to pay their salaries in return for this work which she desired them to do, there would have been no question but the amount would have been deductible. The mere fact that the charitable corporations were to employ them, and were also benefited by their services, does not change the situation.

Both the Board of Tax Appeals and the United States Circuit Court of Appeals denied these claims solely on the ground that they were not made in consideration of money promises of others within the ruling of the *Wade Case*, but we submit that they are in fact stronger cases for allowing the claim than the case of pledges in reliance on other pledges, which were approved by the Board of Tax Appeals in the *Wade Case* and by the United States Circuit Court of Appeals in the case of *Commissioner v. Taft, Executor*, (R. 77; 92 Fed. (2d) at 670) heard by the Circuit Court at the same time that the present case was heard, and which is covered by the same opinion. The charitable corporation was required to pay out money for services which were clearly adequate and full consideration in money or money's worth, besides the fact that Mrs. Taft was having things done which she desired to be done.

CONCLUSION

The decision below is erroneous and should be reversed.

Respectfully submitted,

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TAFT, STETTINIUS & HOLLISTER,
of Counsel.
603 Dixie Terminal Building,
Cincinnati, Ohio.
March, 1938.

APPENDIX

1. Summary of Ohio cases prior to Irwin Admr. v. Lombard

The State of Ohio has been more liberal than any other State in its decisions that subscriptions, particularly to universities are binding. Earlier decisions in the Ohio courts are as follows:

Farmers' College v. Executors of McMicken, 2 Disney Cincinnati Superior Court Reports 495, in which the syllabus reads as follows:

> "First. A gratuitous subscription to pay certain moneys toward a particular stated fund to be raised for the endowment of certain new professorships in a college, becomes a fixed legal obligation as soon as the college has performed its undertakings and raised the required amount of reliable subscriptions.
>
> Second. Such subscription is a proposition to the college to do an act if the college will perform a prescribed duty on its part, and if accepted, the contract is complete."

Hooker v. Wittenberg College, 2 Cincinnati Superior Court Reports 353.

Sturges v. Colby, 3 Weekly Law Bulletin, 643 (United States District Court for the Northern District of Ohio). The syllabus is as follows:

> "1. College subscriptions in aid of endowments become fixed and legal obligations as soon as the college performs the undertaking on its part.
> 2. Such subscriptions, thus becoming valid contracts, may be proved in bankruptcy."

Commissioners of the Canal Fund v. Perry, 5 Ohio 56, the syllabus of which reads as follows:

> "Undertakings by written subscription to contribute money or other property, in aid of public works, are valid contracts, that may be enforced in courts of justice."

It is significant that here, as in later cases, the court lays special emphasis on the validity of gifts given to public authorities expressly authorized by statute to receive them.

O. W. F. College v. Love's Executor, 16 O. S. 20.

In this case also, the court lays emphasis on the statutory power of the college to receive gifts. The court expressly finds that the gifts of others are not essential, in the following statement in the opinion (p. 27):

> "Nor does the instrument lose the character of a subscription by the fact that it is on a separate paper, unconnected with subscriptions made by others. This is clearly unessential; though we may remark in this connection that, from the address of the instrument, 'To All Whom it may Concern,' it would seem to have been intended as a spur to the liberality of other friends of a common cause, and it is reasonable to suppose that the appeal would not be wholly unavailing."

The court admits that the Ohio rule is perhaps contrary to the weight of authority (p. 27):

> "It is not easy to reconcile the authorities on this subject, and it may perhaps be conceded that the weight of authority is against the proposition. But, however this may be, it has at all times been the decided policy of this state to favor and promote the interests of education and the general diffusion of knowledge among the people. To this fact, the provisions of the Constitution itself, our system of school laws, and the acts providing for the incorporation of institutions of learning, bear ample testimony."

The court refers to the statute under which the college was incorporated, which authorized it to (p. 27 bottom)

> "hold their property in trust, or derive it from 'donation, gift, devise, or gratuitous subscription.' The plaintiff belongs to the latter class, which is clearly authorized, by necessary implication arising from various provisions of the statute, to procure funds for carrying out the purposes of their several organizations by voluntary subscriptions."

The course of decisions in Ohio was somewhat changed temporarily by the case of *Johnson v. Otterbein University*, 41 O. S. 527, which held that the creation of a fund with which to pay an indebtedness of an educational institution is not a consideration in law for a written promise given by the maker to the institution with a view to contribute to that object. The case expressly recognizes that the *Love Case* rested on the statutory authority given to the Trustees (p. 533):

> "The decision in that case is placed on two propositions: first, that the college was by statute authorized to receive voluntary subscriptions, and second, that the subscription was accepted and liabilities incurred on the faith of it. As we have seen, neither of these grounds is available to the University in the present case."

On the same ground as to the limited power of the Trustees of Otterbein University, recovery was denied in the case of *Sutton v. Otterbein University*, 7 O. C. C. 343, affirmed in the Supreme Court on other grounds.

The authority of the *Otterbein Case*, however, is completely destroyed by the decision of the Supreme Court of Ohio in the case of *Irwin, Admr. v. Lombard University*, 56 O. S. 9. It is stated in that case that the *Otterbein Case* was decided by the Supreme Court Commission contrary to the whole course of decision in Ohio, but that (p. 24) "A majority of the court are

of the opinion that there is not such indentity of facts in that case and this that we are required here to overrule it."

In this case no reliance is placed on the contributions of others nor on the expenditure of money in direct reliance on the gift, but only on the carrying out of the general purposes of the University. The decision itself does put some reliance on the fact that other persons made donations, but Gilpin's desire and his promise was an inducement to them:

> "It is equally apparent that, prompted by the gifts of Gilpin and others, responsibility has been undertaken by the University. It did not abandon the educational enterprise which these donors and promisors were desirous of promoting."

Great stress is laid on the character of the college:

> "Institutions of this character are incorporated by public authority for defined purposes. Money recovered by them on promises of this character cannot be used for the personal and private ends of an individual, but must be used for the purposes defined. To this use the University is restricted, not only by law of its being, but as well by the obligations arising from its acceptance of the promise. A promise to give money to one, to be used by him according to his inclination and for his personal ends, is prompted only by motive. But a promise to pay money to such an institution, to be used for such defined and public purposes, rests upon consideration.
>
> The general course of decisions is favorable to the binding obligation of such promises. They have been influenced, not only by such reasons as those already stated, but in some cases at least, by state policy as indicated by constitutional and statutory provisions. The policy of this state, as so indicated, is promotive of education, religion and philanthropy. In addition to the declarations of the Constitution upon the subject, the policy of the state is indicated by numerous legislative enactments

providing for the incorporation of colleges, churches, and other institutions of philanthropy, which are intended to be perpetual, and which, not only for their establishment, but for their perpetual maintenance, are authorized to receive contributions from those who are in sympathy with their purposes and methods—the only source from which, in view of their nature, their support can be derived. Looking to the plainly declared purpose of the law-making department, promises made with a view to discharging the debts of such institutions, to providing the means for the employment of teachers, to establish endowment funds to give them greater stability and efficiency, and whatever may be necessary or helpful to accomplish their purposes or secure their permanency, must be held valid. A view which omits considerations of this character is too narrow to be technically correct.

It is not contemplated by the parties, nor is it required by the law, that in cases of this character the institution shall have done a particular thing in reliance upon a particular promise. * * * * *

The requirements of the law are satisfied, the objects of the parties secured, and the perpetration of frauds prevented by the conclusion that the consideration for the promise in question is the accomplishment, through the University, of the purposes for which it was incorporated and in whose aid the promise was made. The defense properly failed because there was neither allegation or proof of abandonment of those purposes."

This is the final and conclusive decision of the Ohio Supreme Court on this subject.

2. Section 7916 of Ohio General Code.

Section 7916 of the Ohio General Code, reads as follows:

> "For the further endowment, maintenance, and aid of any such university, college or institution heretofore or hereafter founded, the board of directors thereof, in the name and in behalf of such municipal corporation may accept and take as trustee and in trust for the purposes aforesaid any estate, property or funds which may have been or may be lawfully transferred to the municipal corporation for such use by any person, persons or body corporate having them, or any annuity or endowment in the nature of income which may be covenanted or pledged to the municipal corporation, towards such use by any person, persons or body corporate. Any person, persons or body corporate having and holding any estate, property or funds in trust or applicable for the promotion of education, or the advancement of any of the arts or sciences, may convey, assign and deliver these to such municipal corporation as trustee in his, their or its place, or covenant or pledge its income or any part thereof to it. Such estate, property, funds or income shall be held or applied by such municipal corporation in trust for the further endowment, maintenance and aid of such university, college or institution, in accordance nevertheless with the terms and true intent of any trust or condition upon which they originally were given or held."

The latter part of Section 7917 of the General Code reads as follows:

> "Any acceptance or acceptances by such municipal corporation of any or all property, funds, rights, trust estate or trust heretofore given, granted, assigned, or otherwise conveyed or transferred to, or bestowed upon such a municipal corporation, or to or upon such a university, college or institution in good faith, and which are still held and retained by such municipality or such a university, college or institution, shall be held and deemed to be valid and binding as to all parties."

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 746

ROBERT A. TAFT, EXECUTOR OF THE ESTATE OF ANNA S. TAFT, DECEASED, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 19–32) is reported in 33 B. T. A. 671. The opinion of the Circuit Court of Appeals (R. 72–78) is reported in 92 F. (2d) 667.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 2, 1937. (R. 72.) Petition for a writ of certiorari was filed February 1, 1938, and was granted March 7, 1938 (R. 78). The juris-

diction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether amounts payable pursuant to certain promises made by decedent in her lifetime were deductible from her gross estate as claims against the estate incurred bona fide and for an adequate and full consideration in money or money's worth, within the meaning of Section 303 (a) (1) of the Revenue Act of 1926, or as transfers to charitable institutions under Section 303 (a) (3) of that Act.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved will be found in the Appendix, *infra*, pp. 39–44.

STATEMENT

The following is a summary of the material facts found by the Board of Tax Appeals:

The decedent died on January 31, 1931 (R. 20).

In May 1930, the decedent made an offer, which the University of Cincinnati immediately accepted, to establish the Charles Phelps Taft Memorial Fund for use in teaching the humanities, to which she expected "ultimately" to transfer $2,000,000, and meanwhile amounts equivalent to the income of such a fund. The trust was formed, and $50,000 was given to it in October 1930, of which $33,800 was appropriated in December 1930, by the trustees

to specific uses by the university, $11,753.83 being actually spent by the university before decedent's death. Thereafter the taxpayer, decedent's executor, paid amounts to the trust fund from time to time roughly equivalent to interest at prevailing rates upon the $2,000,000 (R. 23; see R. 49).

Before her death, decedent had promised to contribute to the Cincinnati Institute of Fine Arts $3,920 each year for two years, to be used to pay the compensation of two musicians in the Symphony Orchestra who would otherwise have been dropped from the orchestra for want of sufficient funds to pay them. She paid the first $3,920 before her death, and the taxpayer, as her executor, paid the second $3,920 after her death (R. 27).

In a letter of June 3, 1929, to the president of the Cincinnati Institute of Fine Arts, the decedent promised to contribute $10,000 per annum toward the salary of a man to be employed by the institute as director of art. Thereupon the institute engaged such a man. Before her death the decedent paid $10,000 which was used for the payment of such salary in 1930, and $5,000 in 1931. After her death the taxpayer, as her executor, paid $5,000 in 1931 as the remainder of what he regarded as the obligation for 1931, and in March, 1932, paid $5,000 more (R. 30–31).

In 1930 the decedent promised the University of Cincinnati to pay $3,000, the amount of his salary, if the university would employ Professor Kelly to

give a course in musical appreciation, a course which the university was not otherwise financially able to support. Kelly was employed and the decedent made five periodic payments of $300 to the university in this amount during her lifetime, and the taxpayer, as her executor, paid $1,500 on this amount after her death (R. 31).

The taxpayer claimed deductions from the gross estate of the foregoing items, under Section 303 of the Revenue Act of 1926, but the Commissioner disallowed them (R. 42). Upon review by the Board of Tax Appeals, the Commissioner's action was sustained as to those items, and the court below affirmed.

SUMMARY OF ARGUMENT

I

The promises made by decedent to charity were legally enforceable against the executor and were the fruit of a generous-spirited philanthropy. But it seems plain enough that the statute does not permit the deduction of their amount from the value of the gross estate.

Claims against the estate may be deducted under Section 303 (a) (1) only when "incurred or contracted bona fide and for an adequate and full consideration in money or money's worth." As these words are ordinarily used, it is plain that they do not embrace a promised gift to charity. Such, too, is the conclusion compelled by the legislative history of the section. The quoted limitation upon de-

duction appeared in the 1924 Act for the first time, when it required that the claims be incurred for "fair" consideration. Apparently in response to a decision that "fair" was not so rigorous a limitation as "adequate" or "full" consideration, the 1926 Act was revised to require that the consideration be "adequate and full." The Treasury Regulations, at least since 1929, have expressly forbidden the deduction of a pledge or subscription made without adequate and full consideration in cash or its equivalent. In the nine years since its promulgation, Congress has four times amended the estate tax and has twice amended the section in question. It must, therefore, be taken to have adopted the interpretation of the Regulations.

The Board of Tax Appeals has consistently ruled that mere promises to make gifts to charities are not deductible claims. Such has been the decision in the Circuit Courts of Appeals for the Second, Sixth, and Eighth Circuits. Only the Court of Appeals for the Third Circuit has decided to the contrary.

That the decedent could have secured tax exemption had she made her gifts outright, or in her will, is immaterial; the Revenue Acts must be applied as they are written.

II

Nor may these promises be deducted from the gross estate under Section 303 (a) (3). That section relates only to "bequests, legacies, devises, or transfers" to a charitable corporation. The term

"transfers" as used in the section relates only to those made in contemplation of death, or intended to take effect at or after death, and which are therefore included in the gross estate. Moreover, the term "transfer" refers to a completed transaction, by which the title or possession to the property has passed. This evident purpose of the section is confirmed by its legislative history, which indicates a congressional desire for a precise correlation with the section which includes the amount of certain *inter vivos* transfers in the gross estate. Ever since 1921, the Regulations have required that the transfer be one made "in the lifetime of the decedent." The repeated re-enactment of the statute indicates congressional approval such that the Regulations have the force of law.

The Circuit Court of Appeals for the Second and Third Circuits have ruled that promises such as these are deductible transfers; in none of the opinions has there been an explanation of the decision, except a patently erroneous impression in the Third Circuit that this Court had approved the ruling in the Second Circuit. The Circuit Courts of Appeals for the Sixth and Eighth Circuits, on the other hand, have held that mere promises to give money are not transfers and can not be deducted. The Circuit Court of Appeals in the Tenth Circuit, in deciding a related question has indicated a similar approach.

Whatever the policy of Congress to encourage gifts to charity, the petitioner can not claim a de-

duction which is plainly not allowed by the statute. At the most, as the court below has said, the decedent promised in the future to make transfers. These promises were not transfers in her lifetime. Indeed, in the case of the gift to the University to endow studies in the humanities, the record does not show that the funds had even yet been transferred to the University.

ARGUMENT

I

THE CLAIMS WERE NOT INCURRED BY THE DECEDENT FOR AN ADEQUATE AND FULL CONSIDERATION IN MONEY OR MONEY'S WORTH WITHIN THE MEANING OF SECTION 303 (A) (1)

The decedent promised varying sums of money to the University of Cincinnati and to the Cincinnati Institute of Fine Arts; the promises were made, respectively, to endow study courses in the humanities and to finance the employment by the promisees of a director of art, two musicians, and a professor of music. The executor seeks to deduct the amount of these promises from the gross estate of the decedent. His first contention is that the promises were "claims against the estate," deductible under Section 303 (a) (1), *infra.*

It should, in *limine,* be noted that the Government does not argue that these promises were not legally enforceable against the executor. Nor, of course, do we wish to be thought unmindful of the

generous-spirited philanthropy which motivated the decedent. But the question is whether the statute permits the executor to deduct the amount of these promises from the gross estate of the decedent. It seems plain enough that no such permission is granted.

1. Section 303 (a) (1) of the Revenue Act of 1926, *infra*, authorizes the deduction from the gross estate of—

> Such amounts for * * * claims against the estate, * * * *to the extent that such claims * * * were incurred or contracted bona fide and for an adequate and full consideration in money or money's worth,* * * * as are allowed by the laws of the jurisdiction * * * under which the estate is being administered. [Italics added.]

Language hardly could be clearer. Congress has unmistakably indicated that the deductible claim must not only be one founded on legally sufficient consideration but also one for which the claimant has given a substantial equivalent, measured in pecuniary terms.[1]

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[1] So plain is this purpose that there is no occasion to explore the nature of the "consideration" which underlies the charitable subscription. The commentators deny that there is any consideration at all, and choose to explain the cases holding the subscriptions enforceable in terms of a promissory estoppel, or of an exception carved out of the general requirement that an enforceable promise have consideration. Williston on Contracts (1936 ed.), I, Sec. 116; Billig, *The Problem of Consideration in Charitable Subscriptions*, 12

Whatever the "consideration" which made the decedent's promises enforceable, whatever the pleasure and satisfaction derived by decedent from her generosity, it cannot be argued that it was "adequate and full * * * in money or money's worth", as those terms are ordinarily used. With words so much a part of common speech as these, neither the lexicographers[2] nor the courts can contribute appreciably to the content of their "plain popular meaning" (*United States* v. *Kirby Lumber Co.*, 284 U. S. 1, 3). But it may be noted that the courts in more or less dissimilar situations have held that "adequate consideration" imports more than legal consideration,[3] or, indeed, that it means the fair monetary equivalent of the thing promised;[4] "adequate and full considera-

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Corn. L. Q. 467; cf. Restatement, Law of Contracts, I, sec. 90. If there were *no* consideration for the decedent's promises, any further inquiry as to its adequacy under the statute would be vain.

[2] Petitioner suggests (Br. 14–15) that the whole clause can be taken to mean "legal consideration" since one definition of "full" is "adequate," and one definition of "adequate" is "legally sufficient." By choosing others of the many definitions offered in Webster, one could more naturally conclude that the clause requires consideration which is perfectly or completely (full) equal or correspondent (adequate) to the money which is promised, and is its full equivalent (money's worth).

[3] *Hays* v. *Patterson*, 97 Kan. 478, 480; *Greenwood* v. *Greenwood*, 96 Kan. 591, 595.

[4] *U. S. Smelting Co.* v. *Utah Power Co.*, 58 Utah 168, 180; *In re Fulton's Estate*, 176 Cal. 663, 668; *Boulenger* v. *Morison*, 88 Cal. App. 664, 669; *Cushing* v. *Levi*, 117 Cal. App. 94.

tion" thus cannot mean less than the full pecuniary value. So, too, "money or money's worth" has been held to mean "cash or its equivalent."[5] And in *Attorney-General* v. *Boden,* L. R. [1912] K. B. 1, 539, 560–565, the court unhesitatingly recognized that the corresponding requirement of the British estate tax, exempting property passing from the decedent under a purchase from him "for full consideration in money or money's worth paid to the vendor" covered only financial or pecuniary consideration.

2. The plain meaning of Section 303 (a) (1) is confirmed by the history of this section. Section 203 (a) (1) of the Revenue Act of 1916, c. 463, 39 Stat. 756, Section 403 (a) (1) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, and Section 403 (a) (1) of the Revenue Act of 1921, c. 136, 42 Stat. 227, each provided for an unqualified deduction of the claims against an estate "allowed by the laws of the jurisdiction" governing administration. Cf. *In re Atkins' Estate,* 30 F. (2d) 761 (C. C. A. 5th). In 1924 the law was amended so as to authorize deduction of claims against the estate only to the extent that they were "incurred or contracted bona fide and for a fair consideration in money or money's worth." See Section 303 (a) (1) of the Revenue Act of 1924, c. 234, 43 Stat. 253. This qualification served sharply to contract the classes of claims which could be deducted from the gross estate.

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[5] *Gillett* v. *Chicago Title & Trust Co.*, 230 Ill. 373, 408; see *Wetherbee* v. *Baker*, 35 N. J. Eq. 501.

However, after passage of the 1924 Act, in *Ferguson* v. *Dickson,* 300 Fed. 961 (C. C. A. 3rd), certiorari denied, 266 U. S. 628, a similarly phrased exception to the contemplation of death provision (Sec. 402 (c) of the 1918 Act) served to exempt from taxation a "sale" made in consideration of the wife's release of her inchoate right of dower. The court contrasted 'fair" consideration with "adequate" consideration, as used in the Act of 1864 (sec. 132, c. 173, 13 Stat. 223, 288), and with "full" consideration, as used in the Massachusetts act (Laws of 1921, c. 65, sec. 3), and concluded that the exception covered any sale which is "honest, reasonable, and free from suspicion" whether or not the consideration is "strictly 'adequate' or 'full' " (p. 964). When the Revenue Acts were next revised, Congress changed the wording of the phrase and permitted the deduction of claims against the estate only when "incurred or contracted bona fide and for *an adequate and full* consideration in money or money's worth." Section 303 (a) (1) of the 1926 Act, *infra.*[6]

The history of the provision thus shows a consistent effort by Congress to narrow the group of deductible claims to those for which the decedent had received an equivalent pecuniary benefit. The final change, amending Section 303 (a) (1) of the 1926 Act, confirms this conclusion. Section 805 of

[6] This change was inserted by the conference committee and no explanation was made. See H. Rpt. No. 356, 69th Cong., 1st Sess., pp. 49–50.

the Revenue Act of 1932 (c. 209, 47 Stat. 169). The amended section limits deductible claims against the estate to the extent that they were incurred or contracted bona fide and for an adequate and full consideration in money or money's worth "when founded on a promise or agreement." This change was made because of a fear that claims based on tort or arising by operation of law could not otherwise be deducted.[7] This change would hardly have been made had the section merely excluded claims which were unenforceable or were not bona fide.

A similar conclusion results if attention turns from the progressive refinement of the limitation to its source. From the 1916 to the 1924 Acts, in taxing transfers made in contemplation of death or intended to take effect at or after death, Congress exempted "a bona fide sale for a fair consideration in money or money's worth."[8] In the Revenue Act

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[7] H. Rpt. No. 708, 72d Cong., 1st Sess., reads (p. 48):

> (4) A clarifying provision limiting the requirement of an adequate and full consideration in money or money's worth to liabilities founded on contract. The existing law might be open to a construction under which no claim against the estate would be deductible unless supported by an "adequate and full consideration in money or money's worth," but the real intent could hardly have been to deny the deduction of liabilities imposed by law or arising out of torts, and the amendment whereby the requirement of a consideration applies only where the liability is founded on contract is designed to clear up any doubt which may be thought to exist.

See, also, S. Rpt. No. 665, 72d Cong., 1st Sess., pp. 50–51.

[8] Revenue Act of 1916, sec. 202 (b), c. 463, 39 Stat. 756; Act of 1918, sec. 402 (c), c. 18, 40 Stat. 1057; Act of

of 1924 the identical language was used to limit the claims which could be deducted from the value of the gross estate because "on principle the same limitation should be applied here." [9]

Had the decedent conveyed property to the charitable corporations in contemplation of death rather than made promises to them, it hardly would be argued that the conveyance was "a bona fide *sale* for an adequate and full consideration in money or money's worth." [10] Since the limitation on deductible claims is intended to have the same scope, it can not be thought to permit the deduction of claims which were incurred for a consideration insufficient under Section 302 (c). *Latty* v. *Commissioner,* 62

1921, sec. 402 (c), c. 136, 42 Stat. 227; Act of 1924, sec. 302 (c), c. 234, 43 Stat. 253.

[9] H. Rpt. No. 179, 68th Cong., 1st Sess., reads (p. 28):

> Section 303:
> In paragraph (1) of subdivision (a) a clause has been inserted, authorizing the deduction of claims, mortgages, and indebtedness of the estate only to the extent that such claims, mortgages, and indebtedness have been incurred or contracted for a fair consideration. Section 402 (c) of the existing law contains a limitation similar in character in the case of transfers and trusts, whereby property interests transferred by the decedent in contemplation of or intended to take effect at or after his death are included in his gross estate, unless such interests were transferred by a bona fide sale for a fair consideration. On principle the same limitation should be applied here, and the proposed amendment is designed to effect this result.

See, also, S. Rpt. No. 398, 68th Cong., 1st Sess., p. 35.

[10] The controversy would be somewhat academic, of course, since Section 303 (a) (3) permits deduction of such transfers from the gross estate.

F. (2d) 952, 954 (C. C. A. 6th); cf. *Helvering* v. *Bullard*, No. 349, this Term.

3. The Treasury Regulations applicable to this question remove it from any doubt. The regulations promulgated under the 1924 Act and the first edition of those under the 1926 Act in this respect merely paraphrased the statutory language. Regulations 68, Arts. 29, 36; Regulations 70 (1926 Ed.), Arts. 29, 36. But the 1929 edition of Regulations 70 makes the application of the statute perfectly clear. Article 36 provides in part:

> A pledge or a subscription evidenced by a promissory note or otherwise, even though enforceable against the estate, is deductible only to the extent such pledge or subscription was made for an adequate and full consideration in cash or its equivalent received therefor by the decedent.

So far as is material to the case in this Court, this language has been retained in all subsequent regulations.[11]

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[11] Regulations 80 (1934 ed.), Art. 36 and Regulations 80 (1937 ed.), Art. 36, insert the requirement that the pledge or subscription be "made *bona fide and* for an adequate and full consideration" and omit the requirement that the consideration be "received therefor by the decedent."

The Commissioner did not seek review of that part of the decision below (R. 77–78) holding deductible pledges contingent on contributions by others or to endow scientific research. Since that question is not before this Court, it is unnecessary to consider the effect of the omission of the last five words in the subsequent regulations.

This provision of the Regulations expressly excludes just such claims for deduction as are made in the case at bar. It has been in effect for nine years. During that time Congress has four times amended the estate tax and has twice amended the very section under which these regulations were promulgated.[12] They have, accordingly, a status closely similar to that of a regulation which has been confirmed by reenactment of the section under which it is issued. Congress must, therefore, be taken to have adopted its interpretation, such that the Regulation has the force of law. *Hassett* v. *Welch,* No. 375, this Term (pamph. p. 7); *Old Mission Co.* v. *Helvering,* 293 U. S. 289, 294; *Hartley* v. *Commissioner,* 295 U. S. 216, 220.

Neither in his petition for certiorari nor in his brief on the merits does petitioner attack the validity of these regulations. This in itself might be sufficient to require affirmance of the decision of this question by the court below. See Stone and Cardozo, JJ. concurring in *Brush* v. *Commissioner,* 300 U. S. 352, 374; compare *Morehead* v. *New York ex rel. Tipaldo,* 298 U. S. 587, 604–605; *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379, 389.

4. The Board of Tax Appeals has consistently ruled that mere promises to make gifts to charities are not deductible as claims against the estate.

[12] See Revenue Act of 1932, sec. 805, c. 209, 47 Stat. 169; Act of 1934, sec. 403 (a), c. 277, 48 Stat. 768; Act of 1935, Title II, c. 829, 49 Stat. 1014; Act of 1936, sec. 805, c. 690, 49 Stat. 1648.

Esther Porter v. *Commissioner*, 23 B. T. A. 1016, 1025, affirmed in part, 60 F. (2d) 673 (C. C. A. 2d), affirmed on another issue, 288 U. S. 436; *Turner* v. *Commissioner*, 31 B. T. A. 446, reversed, 85 F. (2d) 919 (C. C. A. 3d); *Safe Deposit & Trust Co.* v. *Commissioner*, 35 B. T. A. 259, 265, appeal pending (C. C. A. 4th); see *Romberger* v. *Commissioner*, 21 B. T. A. 193, 197. The Board has, on the other hand, with a like consistency ruled that pledges made in consideration of other subscriptions to the same institution are deductible claims.[13] Since the Commissioner did not seek review of that question, the merits of the decisions cited in the margin need not be considered in this case.

The question before this Court has been considered by four Circuit Courts of Appeals. With the exception of one in the Third Circuit each decision supports or is consistent with the Commissioner's interpretation of Section 303 (a) (1).

In *Esther Porter* v. *Commissioner*, 60 F. (2d) 673 (C. C. A. 2d), affirmed on another issue, 288 U. S. 436, the court denied a deduction claimed under Section 303 (a) (1) because the decedent had promised a hospital to pay the cost of an X-ray

[13] *Wade* v. *Commissioner*, 21 B. T. A. 339; *McIlhenny* v. *Commissioner*, 22 B. T. A. 1093, 1105; *Reed* v. *Commissioner*, 24 B. T. A. 166, 173; *Day* v. *Commissioner*, 34 B. T. A. 11, 23-24, affirmed, 91 F. (2d) 1009 (C. C. A. 3rd); *Hays* v. *Commissioner*, 34 B. T. A. 808, 813; *Maude L. Porter* v. *Commissioner*, 34 B. T. A. 798, 804, affirmed on another issue, 92 F. (2d) 426 (C. C. A. 2d).

room, which the executors paid after it had been built by the hospital."[14] The court said (pp. 675–676):

> That the testator's promise created a valid contract nobody denies; "promissory estoppel" is now a recognized species of consideration (Restatement of Contracts, § 90); indeed, the doctrine first gained currency in cases like those before us. But the section was certainly not intended to include all contracts supported by a consideration; so much is clear. We need not limit it to cases where the consideration passes to the testator; for example, a promise to pay for goods delivered to another might fall within it, if the testator has recourse over. But if he has not, the transaction is in substance a gift and must stand or fall with section 303 (a) (3). So here, though the testator was bound by his promise, what in fact he did was to give to the hospital a memorial to his son; it was not a financial bargain at all, and subdivision 1 is concerned with such. * * * The statute cannot have meant to make critical the accident that the hospital, by acting upon the promise, fastened a debt upon the estate. So to construe the language is to confuse the purposes of the two subdivisions.

In *Bretzfelder* v. *Commissioner*, 86 F. (2d) 713 (C. C. A. 2d), the court followed its decision in the

[14] The court also held that another gift to charity was deductible as a transfer under Section 303 (a) (3). This part of the decision is discussed below (pp. 31–32).

Esther Porter case and a similar decision was reached in *Lockwood* v. *McGowan,* 13 F. Supp. 966 (W. D., N. Y.), affirmed, 86 F. (2d) 1005 (C. C. A. 2d). So, too, in *Glaser* v. *Commissioner,* 69 F. (2d) 254 (C. C. A. 8th), the court denied a deduction based on a promise to a charitable institution which the executors had paid. The court without "disputing the strength of the moral appeal in the claim for deduction" (p. 255), held (p. 257)—

> that Section 303 (a) (1) does not justify making deduction from the gross estate in a case like the one presented here, where there was not a business transaction on the part of the decedent or a contract intended to augment his estate or to grant him some right or privilege he did not possess before or to discharge him from any existing obligation, but only a contemplated bounty was involved.

See, also, *Latty* v. *Commissioner,* 62 F. (2d) 952, 954 (C. C. A. 6th). And in *Carney* v. *Benz,* 90 F. (2d) 747, 749 (C. C. A. 1st), the court observed that the purpose of the section "was to prevent deductions, under the guise of claims, of what were in reality gifts or testamentary distributions."

On the other hand, the Circuit Court of Appeals for the Third Circuit indicated a contrary conclusion in *Turner* v. *Commissioner,* 85 F. (2d) 919.[15] The decision was placed either on the ground that a promise to give $1,000,000 to the Y. M. C. A. was

[15] The decision is criticized in Note, 50 Harv. Law Rev. 363.

a deductible claim under Section 303 (a) (1) or that it was a transfer under Section 303 (a) (3), and seems in large part to have been influenced by the erroneous assumption that this Court had passed on the question in *Porter* v. *Commissioner*, 288 U. S. 436. The court did, however, ask (p. 920) whether the consideration might not—

> be religious, charitable, or educational considerations which in some cases are not only "adequate and full," but are precious and priceless? We are told that "a good name is rather to be chosen than great riches." Consideration connected with educational, charitable, or religious gifts may not be money in a commercial sense, but it does constitute money's worth in a higher sense.

In two other cases the same court has allowed deductions under Section 303 (a) (1) where the pledges to charity by the decedent were conditioned upon subscriptions by others. *Commissioner* v. *Bryn Mawr Trust Co.*, 87 F. (2d) 607; *Commissioner* v. *Day*, 91 F. (2d) 1009. These decisions thus have no direct application to the question at bar, although it must be recognized that in the *Bryn Mawr* case the court stated (p. 609) that, apart from the promises by others, the consideration might be assumed to be the "expenditure by the college of funds" and that "it is clear that it was in money or money's worth since these expenditures were in money."

The cases in which the claim is founded on a business transaction may be put to one side. *United States* v. *Mitchell,* 74 F. (2d) 571, 575 (C. C. A. 7th): a guaranty of bank indebtedness contracted by a corporation in which members of decedent's family were interested; *Commissioner* v. *Strauss,* 77 F. (2d) 401, 405 (C. C. A. 7th): loans to decedent by his wife and son; *Commissioner* v. *Kelly's Estate,* 84 F. (2d) 958, 963–964 (C. C. A. 7th), certiorari denied, 299 U. S. 603: note given by decedent in payment of debts of deceased husband;[16] *Carney* v. *Benz,* 90 F. (2d) 747 (C. C. A. 1st): guaranty of broker's account of corporation owned by decedent's wife and daughter; *Commissioner* v. *Maude L. Porter,* 92 F. (2d) 426 (C. C. A. 2d): guaranty of bank loans to son-in-law. As was pointed out in both the *Benz* and the *Maude L. Porter cases,* claims based on these commercial transactions are in a quite different category from those based upon gifts.

5. It thus seems evident that the words of the statute, the legislative history of the provision, the regulations interpreting the section, and the preponderant authority in the lower courts, support the decision below (R. 76) that—

> measured by the precise tests of the statute, the promised donations here under consid-

[16] It may be noted, however, that the court in this case stated (p. 964) the rule too broadly: "The test of whether or not a claim is deductible is whether it is enforceable against decedent's estate."

> eration are but gifts, and there is no support for them as claims against the estate which may be deducted, of that full and adequate consideration in money or money's worth that is the unavoidable requirement of the statute.

This Court has recently had occasion to contrast a gift with a compensatory payment. *Bogardus* v. *Commissioner,* 302 U. S. 34. It is plain that each of the claims under consideration were based upon promises of gifts by the decedent. As such, they were not "incurred or contracted * * * for an adequate and full consideration in money or money's worth."

Against these considerations petitioner offers the argument (Br. 14) that the gifts to charity would be deducted from the gross estate under Section 303 (a) (3) if they had been made by will or by transfer in contemplation of death, and that Congress did not intend such a "ridiculous result" as to deny a deduction under Section 303 (a) (1) of claims based on promises to charities. As will be pointed out more fully below, taxpayer confuses the purposes of the two subdivisions here under examination, one of which (Sec. 303 (a) (1)) relates to claims founded upon adequate and full consideration in money or money's worth, which requirement patently excludes gifts, whether made to charities or not; while the other (Sec. 303 (a) (3)) relates only to transfers to certain charities

without regard to consideration. See *Esther Porter* v. *Commissioner, supra,* pp. 675–676. But a perhaps more basic answer is that it is the duty of the taxing authorities and the courts to apply the statutes as they are written, and not to shape the revenue acts into a symmetry which Congress has failed to give. As this Court, in *Crooks* v. *Harrelson,* 282 U. S. 55, 60, said with respect to a much more improbable result, the courts have no authority to disregard the words of a statute merely because they lead to "hard and objectionable or absurd consequences." Compare *Founders General Co.* v. *Hoey,* 300 U. S. 268, 275; *Dupont* v. *United States,* 300 U. S. 150.

We are not here contending (cf. Br. 15–16) that the consideration must necessarily pass to the donor; for example, a promise to pay for goods delivered or money loaned to another might fall within the statute if the decedent had recourse over against the one to whom they were delivered; but if the decedent could never receive "adequate and full consideration in money or money's worth" for his promise, the transaction is in substance a gift. Section 303 (a) (1) thus would have no application and any allowable deduction must be brought within the scope of Section 303 (a) (3).

Taxpayer also suggests (Br. 13, 16) that the test should be whether there is an intention to avoid the estate tax. While the amendments in 1924 and 1926 undoubtedly were intended to prevent or

reduce tax avoidance, petitioner must nonetheless bring the claim within the language of those amendments, and their wording clearly requires something more material and substantial than the moral satisfaction which the decedent undoubtedly obtained in making her benefactions. An absence of intention to avoid the tax is not enough; there must also be found that adequate and full consideration in money or money's worth which the statute requires. Any such consideration plainly is lacking here.

Petitioner argues (Br. 26–27) that there are special reasons why three of the claims should be allowed. These claims are based on the promises to pay $10,000 per annum toward the salary of a director of art, to pay $3,000 as the equivalent of the salary of a music professor, and to pay $3,920 for two years in order that two musicians might be retained by the Symphony Orchestra (*supra,* pp. 3–4). The argument seems to be that because the donee agreed to hire these men the decedent received "an adequate and full consideration in money or money's worth." But there is no reason to distinguish between charitable gifts according as they are directed to a broad or to a specific purpose. Because of the promises the institutions paid these men their salaries and received their services. But in the case of almost every gift the donor contemplates that the donee will use the gift. That the transaction in which

the gift is used embodies full consideration between the parties does not, of course, mean that this consideration may be transplanted to the transaction in which the gift was made.

II

THE ITEMS ARE NOT DEDUCTIBLE UNDER SECTION 303 (A) (3) AS TRANSFERS TO CHARITIES

Petitioner also urges (Br. 23–28) that the amount of these promises may be deducted from the gross estate under Section 303 (a) (3) as "transfers" to charitable institutions. The Government submits that deductions under that subdivision may be taken only with respect to gifts which are both completed transfers at the time of decedent's death and which are in effect testamentary dispositions, such as to be included in the gross estate under Section 302.

1. Section 303 (a) (3) *infra*, permits deduction from the gross estate of:

> The amount of all bequests, legacies, devises, or transfers * * * to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes * * *. The amount of the deduction under this paragraph for any transfer shall not exceed the value of the transferred property required to be included in the gross estate; * * *

The ordinary meaning of the language of this provision carries two concepts, either of which is fatal to petitioner's claim for deduction.

In the first place, the subdivision is confined to testamentary dispositions. "Bequests, legatees, and devisees" cover gifts by way of will. The term "transfers" covers the only other method by which a charity can take property under testamentary disposition (in the sense of taxing statutes)—that is, by gifts made in contemplation of death.[17] In view of the part of the subdivision last quoted, "transfers" can have no other meaning. No "transferred property" but that made in contemplation of death could be included in the gross estate under Section 302 of the Act. Petitioner does not suggest that the promises made by decedent were made in contemplation of death. It follows, since the promises were not in the nature of a testamentary disposition, that they are not "transfers" as used in Section 303 (a) (3).

In the second place, the term "transfer" refers to a completed transaction, by which the title or possession to the property passes from transferor to transferee. It does not embrace a declaration of intention, or a binding promise, to make a trans-

[17] For purposes of simplicity of statement, we shall here use the term "in contemplation of death" also to include transfers intended to take effect in possession or enjoyment at or after death, and transfers subject to change or revocation by the decedent alone or in conjunction with any person. See Section 302 (c) and (d).

fer in the future. As the court below well said (R. 77):

> The most that can be said, we think, in the instant case is that the decedent had contemplated a transfer and had promised to make one. * * *

Neither in the ordinary sense nor in any technical legal use of the term does "transfer" relate to any agreement or transaction other than that by which the property actually passes from one person to another. The lexicographers without exception seem to consider the term as inapplicable to any act which does not serve to complete passage of the title or right.[18] The courts, apparently without exception except that based upon markedly different contexual requirements, have held that agreements to make future transfers, or acts which do not completely pass title or possession to the property are

[18] Bouvier, Law Dictionary (3rd ed.) defines transfer as "the act by which the owner of a thing delivers it to another person, with the intent of passing the rights which he has in it to the latter." Webster's New International Dictionary (2d ed.) defines the term as the act of transferring; the verb is defined: "to convey from one place, person, or thing to another; to transport, remove, or cause to pass to another place, person, or thing; * * * To make over the possession or control of; to make transfer of; to pass; to convey, as a right, from one person or another * * *." The other definitions are substantially identical to that of Webster. See Funk & Wagnalls New Standard Dictionary; Century Dictionary & Cyclopedia; Black, Law Dictionary (2d Ed.).

not "transfers" within the meaning of statutes and contracts.[19]

Petitioner suggests (Br. 24) that in many cases the estate tax statute speaks of "transfer" in the sense of a contract to complete the "actual transfer" at a later date. We do not so read the statute. Certainly, the only example which he gives—the creation of a trust reserving a life estate for himself and his wife with the remainder to charity—does not support him. In such a case the charity has a vested remainder, and title passes to it on creation of the trust. See *Coolidge* v. *Long*, 282 U. S. 582, 597; *Helvering* v. *St. Louis Union Trust Co.*, 296 U. S. 39.

Petitioner does not, and cannot, argue that the promises of the decedent operated of themselves to pass or deliver the money she intended in the future to give to charity. It results that these promises were not "transfers" within the plain meaning of Section 303 (a) (3).

2. If there be doubt as to whether the term "transfers" includes either non-testamentary dis-

[19] See, e. g., *Ware* v. *Quigley*, 176 Cal. 694, 697–698; *Robertson* v. *Wilcox*, 36 Conn. 426, 429–431; *Aurora Fire Ins. Co.* v. *Eddy*, 55 Ill. 213, 220; *Talty* v. *Schoenholz*, 323 Ill. 232; *Estate of Soden*, 105 N. J. Eq. 595; *Van Deusen* v. *The Charter Oak Ins. Co.*, 1 Abb. Pract. (N. S.) 349, 358; *Noble* v. *Ft. Smith Wholesale Grocery Co.*, 34 Okla. 662, 670; *Hill* v. *Cumberland Valley Co.*, 59 Pa. 474, 477; *Hammell* v. *Queens Ins. Co.*, 54 Wis. 72, 85; compare *McVeigh* v. *Chicago Mill & Lumber Co.*, 96 Ark. 480, 491.

positions or mere contracts to make payments in the future, it would be resolved by consideration of the legislative history of Section 303 (a) (3).

The charitable exemption was introduced in Section 403 (a) (3) of the Revenue Act of 1918, which provided simply for the deduction of "bequests, legacies, devises, or *gifts*" to charities. In an obvious effort to bring the italicized category into harmony with the contemplation of death section,[20] this was changed in the 1921 Act to permit the deduction of:

> * * * bequests, legacies, devises, or transfers, except bona fide sales for a fair consideration in money or money's worth, in contemplation of or intended to take effect in possession or enjoyment at or after the decedent's death, * * *.

In the 1926 Act Section 303 (a) (3) retains the same correlation with the contemplation of death section, but accomplishes this in a different manner,[21] by providing that:

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[20] The 1921 amendment was introduced by the Senate committee. S. Rpt. No. 275, 67th Cong., 1st Sess., p. 25, states the purpose of the amendment as follows:

> Section 403 (a) (3) * * * makes it clear that gifts by decedent during his lifetime for public, religious, charitable, scientific, literary, educational, or other benevolent purposes are not deductible where the value of the property given is not required under the law to be included in his gross estate.

[21] While there is no explanation of this change, made in conference, it is probable that it was desired to express the correlation less awkwardly. Especially would this be the

> The amount of the deduction under this paragraph for any transfer shall not exceed the value of the transferred property required to be included in the gross estate; * * *

Thus, it is apparent that, at least ever since the 1921 Act, the term "transfers" as used in Section 303 (a) (3) refers only to those which are embraced within the contemplation of death provision, Section 302 (c) and (d), and which are accordingly included in the gross estate. No transfer would be brought under the contemplation of death section unless it were completed prior to death, and unless it was testamentary in character. Since neither is the case with respect to the promises at issue here, they cannot be transfers to charities within the meaning of Section 303 (a) (3).

3. As has been shown, the charitable deduction section has remained unchanged in operation at least since 1921, although its language was revised

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case had the draftsmen made belated recognition that the 1924 Act introduced a third type of transfer during life, that subject to modification or revocation by the grantor, which was included in the gross estate.

This purpose, more simply to express the content of the old section, is further indicated by the elimination of the proviso, found in the 1921 and 1924 Acts, that the charitable transfers which were deductible were not to be "bona fide sales for a fair consideration in money or money's worth." This proviso had no purpose whatever except to provide a precise correlation with the contemplation of death section. The revised wording in the 1926 Act accomplished this correlation automatically, and the unnecessary proviso accordingly was eliminated.

to accomplish the same result in the 1926 Act. During this seventeen year period the Regulations have consistently denied deduction of promises such as those of the decedent.

Article 47 of Regulations 63 (under the 1921 Act) permitted deduction of property transferred to charity "by the decedent in his lifetime in contemplation of or intended to take effect in possession or enjoyment at or after death." Congress, in the 1924 Act, reenacted the section without change. Article 44 of Regulations 68, under that Act, was identical with the previous Article 47. In Article 44 of Regulations 70 (1926 Ed.) the language of the regulation was changed to conform to the revised wording of the 1926 Act, and permitted deduction of property transferred "by the decedent in his lifetime not to exceed the value of the transferred property required to be included in the gross estate." This, as we have shown in connection with the history of the statutory provision, did not change the operation of the earlier language. The subsequent regulations have left this language unchanged. Articles 44 of Regulations 70 (1929 Ed.), and Regulations 80 (1934 and 1937 Ed.).

It thus will be noted that from 1921 to 1926 the Regulations expressly required that deductible transfers could be only those made in contemplation of death, and that from 1921 until the present time the regulations have consistently required

that the deductible transfer be one made "by the decedent in his lifetime." During this period the estate tax statute has twice been reenacted and has five times been amended; the very section in question has three times been amended.[22] The regulations, therefore, must be taken to have received the approval of Congress such that they now have the force of law (*supra,* p. 15). Moreover, petitioner has not attacked their validity, either in his petition or in his brief on the merits, and the decision of the court below on this question might be affirmed on that ground alone (*supra,* p. 15.)

4. The precise question at bar has been considered in four Circuit Courts of Appeals; in the Second and Third Circuits it has been held that promises to make gifts are "transfers" within the meaning of Section 303 (a) (3); in the Sixth and the Eighth Circuits it has been held to the contrary. A related decision in the Tenth Circuit supports the Government.

The course of decisions in the Second and Third Circuits presents an interesting study. In *Esther Porter* v. *Commissioner,* 60 F. (2d) 673, 675 (C. C. A. 2d) the court held amounts paid by an executor pursuant to a promise by the decedent to be deductible under Section 303 (a) (3) because the court would take judicial notice of the fact that Princeton University was an educational corpora-

[22] See, in addition to the citations in footnote 12, *supra,* Revenue Act of 1928, sec. 401, c. 852, 45 Stat. 791.

tion. There was no discussion of what constitutes a "transfer." This Court, *on petition by the taxpayer,* affirmed the decision below on a wholly different question, 288 U. S. 436. Yet in *Turner* v. *Commissioner,* 85 F. (2d) 919 (C. C. A. 3rd), the court, dealing with a similar promise by the decedent, held it to be a "transfer" because "the decision of the Supreme Court * * * affirming the judgment in that (the *Porter*) case is binding on us" (pp. 919–920; see also p. 920). The court offered no other reason for its decision on this question, except to suggest in passing that the promise "may be regarded as a constructive transfer" (p. 920). In the meantime the court in *Lockwood* v. *McGowan,* 13 F. Supp. 966 (W. D. N. Y.) followed the *Porter* case because "this court feels it is bound by the decision" (p. 967); no independent reason was offered. This decision was affirmed per curiam on the authority of the *Porter* case, 86 F. (2d) 1005 (C. C. A. 2d). In *Commissioner* v. *Bryn Mawr Trust Co.,* 87 F. (2d) 607 (C. C. A. 3rd) the court sustained the deduction under Section 303 (a) (1), but referred approvingly to the *Porter* and *Turner* cases and repeated the earlier error that the *Porter* decision had been affirmed by this Court. Not one of the opinions in these cases offer any reason why the amount of the promises should be deducted under Section 303 (a) (3), and those in the Third Circuit have the further vice of a flagrantly erroneous notion as to the scope of appellate review.

In contrast, the decision of the court below represents a carefully considered examination of the purpose and scope of Section 303 (a) (3). It said (R. 76–77):

> Notwithstanding the cited decisions, it is difficult to understand how a pledge, unexecuted during the life of the promissor, however binding under local law, may constitute a transfer. * * * The most that can be said, we think, in the instant case is that the decedent had contemplated a transfer and had promised to make one. We are unable to conclude that the transfer, if ever it is made, will relate back to the promise to make it, especially as there was by the decedent no allocation of funds or securities to the carrying out of the pledge.

In *Glaser* v. *Commissioner,* 69 F. (2d) 254, certiorari denied, 292 U. S. 654, petition for rehearing denied, 293 U. S. 628, the court noted that in the *Porter* case the question seemed to have been decided without consideration and stated (p. 257):

> The promises made by Mr. Sommers in this case cannot by any reasonable persuasion be brought within the meaning of "bequests, legacies, devises, or transfers" covered by this section of the statute * * *.

Finally, it may be noted that in *United States* v. *Fourth National Bank,* 83 F. (2d) 85, 90, 92 (C. C. A. 10th), certiorari denied, 299 U. S. 575, the court held that, where the decedent in his life

"gave" $100,000 to charity by delivery to an escrow agent, but subject to the condition that an equal amount be raised from others, there was no transfer permitting deduction under Section 303 (a) (3) even after the condition had been met and the executor had paid.

5. The words of the statute, its history and the best considered decisions in the lower courts support the conclusion that the "transfers" which may be deducted under Section 303 (a) (3) are not mere promises to transfer but only those which have been completed by the decedent and which are included in the gross estate by the provisions of Section 302 (c) and (d). Clearly there had been no completed transfer by the decedent of any of the items involved in this case. Cf. *Burnet* v. *Guggenheim,* 288 U. S. 280; *Chase Nat. Bank* v. *United States,* 278 U. S. 327, 334; *Hesslein* v. *Hoey,* 91 F. (2d) 954 (C. C. A. 2d), certiorari denied, December 6, 1937.

It must be borne in mind that the two subdivisions, Section 303 (a) (1) and (3), are separate and distinct. See *Porter* v. *Commissioner,* 60 F. (2d) 673, 675–676 (C. C. A. 2d). Since Congress has described in Section 303 (a) (1) the claims and indebtedness which may be deducted from the gross estate, and likewise has clearly indicated certain claims which may not be deducted, it follows that the provisions of Section 303 (a) (3) should not be construed to include, under the term "trans-

fers," deductions for amounts which are plainly not transfers but are claims and are excluded from deduction as claims. Had Congress desired to permit deductions of claims for the benefit of institutions of the type specified in the statute, it could easily have done so by including them in Section 303 (a) (3), or by excepting claims based on promises to charities from the limitations of Section 303 (a) (1). It has done neither.

Taxpayer's argument (Br. 14) that Congress must have intended to allow deductions such as here claimed seems in last analysis to be based upon the proposition that subdivisions 303 (a) (1) and 303 (a) (3) must be read in conjunction. But, we submit, they are entirely separate and distinct; they came into the estate tax statute at different times and their development has proceeded along different lines; the subdivision relating to claims requires consideration of a character here lacking; subdivision (3) requires a bequest, legacy, devise or transfer, none of which is found here. What Congress clearly intended by subdivision (3) was to allow deductions for transfers to charities, such as those in contemplation of death, which were included as a part of the gross estate, and which were completed in the decedent's lifetime.

Neither the Board of Tax Appeals nor the court below was unmindful of the "recognized policy of the Congress to encourage and to relieve from onerous tax exactions gifts to charitable, religious, and

educational institutions." (R. 24, 26, 76.) See *Old Colony Co.* v. *Commissioner,* 301 U. S. 379, 383; *Edwards* v. *Slocum,* 264 U. S. 61, 63. But they were also aware of the necessity for measuring the scope of the deduction privilege by the "precise tests of the statute" (*New Colonial Co.* v. *Helvering,* 292 U. S. 435, 440). It seems clear, for the reasons we have advanced above, that there were in the instant case no "transfers" such as are required under Section 303 (a) (3) to form the basis for deductions.

Indeed, so far as appears from the record (R. 25, 77), the $2,000,000 item never has been paid over to the University of Cincinnati. It would, we submit, be most anomalous to permit a deduction, as property transferred by the decedent, of a promise which had not yet been performed some four years after her death.

The case of *Smith* v. *Commissioner,* 78 F. (2d) 897 (C. C. A. 1st), referred to by taxpayer (Br. 27) is inapplicable, irrespective of its correctness. There the decision was placed on the ground that state law should govern; under the state law the effect of the compromise of the will contest was to embody the award or compromise in the will. Hence deductions were allowed for amounts paid to charities on the theory that they were legatees. No question such as presented in the instant case, as to whether there was a statutory "transfer", was raised or considered in the *Smith* case.

On pages 24–27 of his brief, the executor urges that the making of the contracts to pay money to the institutions constituted transfers to them; in support of that contention the executor relies upon the decision of this Court in *Chase Nat. Bank* v. *United States, supra.* That case held that a transfer tax might be imposed in respect of proceeds of life insurance policies where the decedent had retained substantial rights which were terminated by his death. It is believed that the *Chase Nat. Bank* case not only does not support the position of the taxpayer but that it strengthens the position of the Commissioner. It supports the propositions that within the meaning of the estate and gift tax laws, the word "transfer" refers to a "completed transfer" and that there is no completed transfer where the transferor has retained substantial control over, or rights with respect to, the property in question. And if that be so, there certainly could have been no transfers in the instant case when the decedent made her promises.

The executor also urges (Br. 27–28) that performance by the executor constitutes a transfer within the meaning of the subdivision. As we have noted, so far as the record shows, the executor never has paid over the $2,000,000 item to the University of Cincinnati. But even if the executor had completed the transfer, the result would not be altered. However laudable the motives of the decedent may have been, her executor must bring his

case within the scope of the statute and he has not done so either by showing promises of the decedent or, with respect to some of the items, performance by her executor. Under subdivision 303 (a) (3) the executor, to justify the deductions claimed, must show transfers completed in the decedent's lifetime, and of a character such as to be included in the gross estate under Section 302. This he failed to do.

CONCLUSION

For the reasons which we have set out, it is respectfully submitted that the judgment of the court below should be affirmed.

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APRIL 1938.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Where within two years prior to his death but after the enactment of this Act and without such a consideration the decedent has made a transfer or transfers, by trust or otherwise, of any of his property, or an interest therein, not admitted or shown to have been made in contemplation of or intended to take effect in possession or enjoyment at or after his death, and the value or aggregate value, at the time of such death, of the property or interest so transferred to any one person is in excess of $5,000, then, to the extent of such excess, such transfer or transfers shall be deemed and held to have been made in contemplation of death within the meaning of this title. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his

death but prior to the enactment of this Act, without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

(d) To the extent of any interest therein, of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. The relinquishment of any such power, not admitted or shown to have been in contemplation of the decedent's death, made within two years prior to his death but after the enactment of this Act, without such a consideration and affecting the interest or interests (whether arising from one or more transfers or the creation of one or more trusts) of any one beneficiary of a value or aggregate value, at the time of such death, in excess of $5,000, then, to the extent of such excess, such relinquishment or relinquishments shall be deemed and held to have been made in contemplation of death within the meaning of this title (U. S. C., Title 26, Sec. 411).

* * * * * *

SEC. 303. For the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a resident, by deducting from the value of the gross estate—

(1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages upon, or any indebtedness in respect to, property (except,

in the case of a resident decedent, where such property is not situated in the United States), to the extent that such claims, mortgages, or indebtedness were incurred or contracted bone fide and for an adequate and full consideration in money or money's worth, losses incurred during the settlement of the estate arising from fires, storms, shipwreck, or other casualty, or from theft, when such losses are not compensated for by insurance or otherwise, and such amounts reasonably required and actually expended for the support during the settlement of the estate of those dependent upon the decedent, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered, but not including any income taxes upon income received after the death of the decedent, or any estate, succession, legacy, or inheritance taxes;

* * * * *

(3) The amount of all bequests, legacies, devises, or transfers, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees, or a fraternal society, order, or association operating under the lodge system, but only if such contributions or gifts are to be used by such trustee or trustees, or by such fraternal society, order, or association, exclusively for religious, charitable,

scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals. The amount of the deduction under this paragraph for any transfer shall not exceed the value of the transferred property required to be included in the gross estate (U. S. C., Title 26, Sec. 412).

Treasury Regulations 80 (1934 ed.):

ART. 29. *Deduction of administration expenses, claims, etc.*—In order to be deductible under the foregoing provision of the statute, the item must fall within one of the several classes of deductions specifically enumerated therein, and must also, except in the case of deductible losses during the administration of the estate, be one the payment of which out of the estate is authorized by the laws of the jurisdiction under which the estate is being administered. Unless both of these conditions exist the item is not deductible. If the item is not one of those described it is not deductible merely because payment is allowed by the local law. If the amount which may be expended for the particular purpose is limited by the local law no deduction in excess of such limitation is permissible. If a claim against the estate, an unpaid mortgage, or an indebtedness is founded upon a promise or agreement, the deduction therefor is limited to the extent that the liability was contracted bona fide and for an adequate and full consideration in money or money's worth. A relinquishment or promised relinquishment of dower, curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the decedent's property or estate, is not to any extent a consideration in money or money's worth.

* * * * *

ART. 36. *Claims against the estate.*—The amounts that may be deducted under this heading are such only as represent personal obligations of the decedent existing at the time of his death, whether then matured or not, and any interest thereon which had accrued at time of death. Only claims enforceable against the estate may be deducted. If the claim is founded upon a promise or agreement the deduction therefor is limited to the extent that the liability was contracted bona fide and for an adequate and full consideration in money or money's worth. A pledge or a subscription, evidenced by a promissory note or otherwise, even though enforceable against the estate, is deductible only to the extent such pledge or subscription was made bona fide and for an adequate and full consideration in cash or its equivalent. See article 29 as to relinquishment or promised relinquishment of dower and similar interests. Liabilities imposed by law or arising out of torts are deductible.

ART. 44. *Transfers for public, charitable, religious, etc., uses.*—Deduction may be taken of the value of all property transferred by will or by the decedent in his lifetime not to exceed the value of the transferred property required to be included in the gross estate if in either case the property was transferred * * * (2) to or for the use of any corporation or association organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes (including the encouragement of art and the prevention of cruelty to children or animals), if no part of the net earnings of the corporation or association inures to the benefit of any private stock-

holder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation; or (3) to a trustee or trustees, or a fraternal society, order, or association operating under the lodge system, if such transfers, legacies, bequests, or devises are to be used by such trustee, trustees, fraternal society, order, or association exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals.

If a trust is created for both a charitable and a private purpose, deduction may be taken of the value of the beneficial interest in favor of the former only in so far as such interest is presently ascertainable, and hence severable from the interest in favor of the private use. Thus, if money or property is placed in trust to pay the income to an individual during his life, or for a term of years, and then to pay or deliver the principal to a charitable corporation, or to apply it to a charitable purpose, the present value of the remainder is deductible. To determine the present value of such remainder use the appropriate factor in column 3 of Table A or B of article 13.

The deduction is not limited, in the estates of residents (or of citizens who died after the enactment of the Revenue Act of 1934), to transfers to domestic corporations or associations, or to trustees for use within the United States.

* * * * *

The corresponding provisions of Articles 29, 36, and 44 of Regulations 80 (1937 edition) are substantially the same as the foregoing.

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SUPREME COURT OF THE UNITED STATES.

No. 746.—October Term, 1937.

Robert A. Taft, Executor of the Estate of Anna S. Taft, Deceased, Petitioner,
vs.
Commissioner of Internal Revenue.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[May 16, 1938.]

Mr. Justice Roberts delivered the opinion of the Court.

The question presented is whether the petitioner, as executor, may deduct from the gross estate amounts payable pursuant to the decedent's binding promises as claims against the estate incurred bona fide and for an adequate and full consideration in money or money's worth within the meaning of Section 303(a)(1), or as transfers to charitable or educational institutions under Section 303(a)(3) of the Revenue Act of 1926.[1] The deductions were of amounts owing at the decedent's death upon the following contractual obligations.

By letter the decedent agreed with the University of Cincinnati to establish a fund as a memorial to her husband, stating that she would make available to the trustees of the fund, whom she named, during the ensuing year, $50,000, during the following year $75,000,

[1] "Sec. 303. For the purpose of the tax the value of the net estate shall be determined—

"(a) In the case of a resident, by deducting from the value of the gross estate—

"(1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages upon, or any indebtedness in respect to, property . . . to the extent that such claims, mortgages, or indebtedness were incurred or contracted bona fide and for an adequate and full consideration in money or money's worth, . . .

" . . .

"(3) The amount of all bequests, legacies, devises, or transfers, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, . . ."

and, in each succeeding year, $100,000 or such other income as might be derived from a fund of $2,000,000 which she would ultimately transfer to the trustees. The letter outlined the terms of the trust to which the income was to be devoted. The offer was formally accepted by the Board of Directors of the University and, pursuant to the agreement, the decedent made payments to the trustees and her executor continued to pay sums on account of interest and principal. The University is an educational institution and no profit enures to anyone from its operation.

Being deeply interested in the Cincinnati Institute of Fine Arts and its work, and having jointly with her husband and as an individual contributed large sums to this work, the decedent, to obviate the necessity of reducing the personnel of the orchestra the Institute conducts, agreed with the Institute that if it would retain two musicians she would pay their salaries under contracts covering two years. In reliance upon her promise the Institute re-engaged the two men. The decedent paid the amount of their salaries prior to her death and petitioner, as executor, paid them to the end of the contract term. The Institute would not have re-employed these men except for the agreement. It is a charitable corporation organized for the maintenance of a symphony orchestra and other activities, and no profit enures to anyone from its operations.

The decedent agreed by letter addressed to the Cincinnati Institute of Fine Arts that if it would employ a director of art she would contribute $10,000 towards his salary. In reliance upon this undertaking the institution engaged such a director at a salary of $10,000 per annum. She paid the stipulated amount for one and one-half years prior to her death and the petitioner, as executor, paid for one year subsequent to her death. There were no available funds for the employment of a director except those received from the decedent and the Institute would not have employed one except for her agreement. It is an educational institution and does not operate for profit.

In 1930 the decedent agreed with the University of Cincinnati that if it would engage a named person as professor to give a specified course of instruction she would pay the University the amount of his salary. She had made similar arrangements for prior years. The University employed the professor and would not have done so except for her agreement. At the time of her

death a sum remained due according to her promise which the petitioner paid.

The total claimed as deductible on account of these obligations was $2,015,420. Under the law of Ohio, the decedent's promises were and are legally binding and enforceable against her estate. The Commissioner ruled, and the Board[2] and the court below[3] have held that the estate's obligations in question, though contracted bona fide, were not incurred for an adequate and full consideration in money or money's worth as required by clause (1) and payments of the sums promised are not transfers to or for the use of any corporation organized and operating exclusively for charitable or educational purposes within the meaning of clause (3) of Sec. 303(a) of the Act. We granted certiorari because of an alleged conflict of decision.[4]

1. The claims against the estate were not incurred or contracted for an adequate and full consideration in money or money's worth within the meaning of the statute. The terms used, the legislative history of the section, and the regulations interpreting it, require this conclusion. The conditions imposed by the decedent as to the expenditure of the money promised and the stipulation on the part of the payee to expend it in that fashion, or its compliance with the conditions, do not constitute an adequate or a full consideration in money or money's worth within the meaning of the Act. If there were doubt about the matter the legislative history of the statute and the Treasury regulations would require us so to hold. The Revenue Act of 1916 permitted the deduction of the amount of claims against the estate "allowed by the laws of the jurisdiction . . . under which the estate is being administered."[5] The Acts of 1918 and 1921 contain like provisions.[6] Under these Acts the claims in question would have been deductible as enforceable by state law irrespective of the nature of the consideration.[7] The

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[2] 33 B. T. A. 671.

[3] 92 F. (2d) 667.

[4] See Turner *v.* Commissioner, 85 F. (2d) 919; Commissioner *v.* Bryn Mawr Trust Co., 87 F. (2d) 607; Porter *v.* Commissioner, 60 F. (2d) 673; Bretzfelder *v.* Commissioner, 86 F. (2d) 713; Lockwood *v.* McGowan, 86 F. (2d) 1005.

[5] Revenue Act of 1916, Sec. 203 (a) (1), 39 Stat. 756, 778.

[6] Revenue Act of 1918, Sec. 403 (a) (1), 40 Stat. 1057, 1098; Revenue Act of 1921, Sec. 403 (a) (1), 42 Stat. 227, 279.

[7] Atkins *v.* Commissioner, 30 F. (2d) 761.

Act of 1924 altered existing law and authorized the deduction of claims against an estate only to the extent that they were "incurred or contracted bona fide and for a fair consideration in money or money's worth."[8] Congress had reason to think that the phrase "fair consideration" would be held to comprehend an instance of a promise which was honest, reasonable, and free from suspicion whether or not the consideration for it was, strictly speaking, adequate.[9] The words "adequate and full consideration" were substituted by Sec. 303(a)(1) of the Act of 1926. There must have been some reason for these successive changes. It seems evident that the purpose was to narrow the class of deductible claims, and we are not at liberty to ignore this purpose.

The regulations of the Treasury promulgated under the Act of 1924 and the first edition applicable to that of 1926, paraphrased the statutory language.[10] The 1929 edition of Regulation 70, Art. 36, provides in part: "A pledge or a subscription evidenced by a promissory note or otherwise, even though enforceable against the estate, is deductible only to the extent such pledge or subscription was made for an adequate and full consideration in cash or its equivalent received therefor by the decedent."[11] Since 1929 the regulations have excluded deductions such as those in issue here. Meantime the estate tax provisions have been amended four times and the section under which the regulations were promulgated has been amended twice. We must assume that Congress was familiar with the construction put upon the section by the Treasury and was satisfied with it. The Board of Tax Appeals[12] and the courts,[13] with the exception of the Circuit Court of Appeals for the Third Circuit,[14] have held that a promise to pay money to a charitable

[8] Revenue Act of 1924, Sec. 303 (a) (1), 43 Stat. 253, 305.

[9] See Ferguson *v.* Dickson, 300 Fed. 961, 964.

[10] Regulations 68, Arts. 29, 36; Regulations 70 (1926 Ed.) Arts. 29, 36.

[11] See also Regulations 80, 1934 Ed., Art. 36; Regulations 80, 1937 Ed., Art. 36.

[12] Porter *v.* Commissioner, 23 B. T. A. 1016, 1025; Turner *v.* Commissioner, 31 B. T. A. 446; Safe Deposit & Trust Co. *v.* Commissioner, 35 B. T. A. 259, 265.

[13] Porter *v.* Commissioner, 60 F. (2d) 673; Bretzfelder *v.* Commissioner, 86 F. (2d) 713; Glaser *v.* Commissioner, 69 F. (2d) 254; Carney *v.* Benz, 90 F. (2d) 747, 749; Lockwood *v.* McGowan, 13 F. Supp. 966, affirmed 86 F. (2d) 1005.

[14] Turner *v.* Commissioner, 85 F. (2d) 919; Commissioner *v.* Bryn Mawr Trust Co., 87 F. (2d) 607, 609.

or educational institution, where the only consideration was a stipulated application of the amount received, does not constitute a claim against the estate contracted for an adequate and full consideration in money or money's worth notwithstanding the fact that under local law the promise is enforceable. In this view we agree.

2. Payments pursuant to the promises are not transfers within the meaning of Section 303(a)(3). The court below excluded the payments from the operation of that section upon two grounds. Both, as we think, are valid. The petitioner's payment, after the decedent's death, of a sum promised during her life, is not appropriately designated a transfer. True the decedent has promised to make a transfer but fulfillment of the promise by the executor does not relate back to the time the promise was made so as to convert her promise into a transfer by her. Here the subject of the transfer was not identified by any allocation of decedent's funds during her life. This fact adds point to the view that she made no transfer.

Subsection (3) applies only to testamentary dispositions. The phrase is "the amount of all bequests, legacies, devises, or transfers" to certain specified religious, charitable, scientific, literary or educational uses. The right to the deduction is qualified by the provision "The amount of the deduction under this paragraph for any transfer shall not exceed the value of the transferred property required to be included in the gross estate." The only transfers required to be included in the gross estate are those made in contemplation of death or to take effect in possession or enjoyment at or after death.[15] In other words, only such transfers as are testamentary in character are to be included in the gross estate, and it follows that only those of that character are deductible under subsection (3). Those here in question were clearly not such. There is no claim that the agreements were made in contemplation of death or to take effect in possession or enjoyment at or after death.

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[15] See Sec. 302 (c), 44 Stat. 70. "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, . . . (c) To the extent of any interest therein of which the decedent has at any time made a transfer, . . . in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth". . . . See also subsection (d), 44 Stat. 71.

3. The petitioner urges that all of the revenue acts have granted liberal deductions in respect of income tax and estate tax for contributions to charitable and educational purposes. He says that if the benefactions in question had been made in the form of bequests or gifts to take effect at death there would be no question of the right to the claimed deductions. He urges, therefore, that we should adopt a liberal construction of the Act to effectuate the intent of Congress even though the payments in question do not fall within the strict meaning of the words used. But we are not permitted to speculate as to the reasons why the policy evidenced with respect to other forms of gift was not extended to claims upon promises enforceable by state law. We are bound to observe the alterations made in the successive acts which, in the plain meaning of the language employed, exclude deduction of enforceable claims of the sort here involved, even though the case be a hard one. The testatrix was bound to bring her transactions within the letter of the statutory provisions and the regulations at the risk that noncompliance might deprive her estate of tax immunity as respects the pledges.

The judgment is

Affirmed.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.